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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 124.

THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

J. W. ECKMAN, GUARDIAN OF ALFONSO HUESSELMANN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED JUNE 27, 1901.

(18,211.)

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1 *Caption.*

THE UNITED STATES OF AMERICA,
Western District of Texas.

At a term of the circuit court of the United States for the fifth circuit and western district of Texas, the Honorable T. S. Maxey, United States district judge, presiding, and holding its sessions at El Paso, Texas, and which term began on the 1st day of April, A. D. 1901, there came on to be heard, amongst other causes, pending on the law side of the docket, the following cause:

J. W. ECKMAN, Who Sues as Guardian of Alfonso Huesselmann, Plaintiff,
vs.
THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, Defendant.
No. 261.

Plaintiff's Original Petition.

Filed March 5th, 1900.

In the United States Circuit Court for the Western District of Texas, at El Paso Division.

J. W. ECKMAN, Who Sues as Guardian of Alfonso Huesselmann,
vs.
THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED.
No. 261.

To the honorable United States circuit court for the western district of Texas:

Now comes J. W. Eckman, who sues as guardian of Alfonso Huesselmann, and represents to the court that he, the said guardian, and his said ward, are resident citizens of El Paso county, Texas, and of the western district of Texas, and that the defendant, The Mexican Central Railway Company, Limited, is a railway corporation duly incorporated under the laws of, and a citizen of, the State of Massachusetts, doing business in El Paso county, Texas, and has and at all times hereinafter mentioned has had and maintained an office and agent in El Paso county, Texas, whose name is Solon Comfort. That the said defendant, The Mexican Central Railway Company, Limited,
owns and operates, and at all times hereinafter mentioned has
2 owned and operated, a line of railway from the city of Mexico, in the Republic of Mexico, to and into El Paso county, Texas, carrying on and conducting the ordinary business of a railway company as a common carrier of goods and passengers for hire. That the plaintiff, J. W. Eckman, was duly appointed guardian of the person and estate of the said Alfonso Huesselmann, who is a minor, by the county court of El Paso county, Texas, at

the March term, 1900, thereof, and that under said appointment he duly qualified by taking the oath and giving bond as required by law.

That on or about the 6th day of February, 1899, and for some time next prior thereto, the said Alfonso Huesselmann was an employé of said defendant, engaged in the employment of brakeman on a freight train, being train No. 10 on defendant's road. That on said 6th day of February, 1899, at a siding called La Labor, on the line of the Mexican Central Railway Company from Tampico to Cardenas, he, the said Alfonso Huesselmann, was ordered and directed by the conductor in charge of said train, whose name was Griffin, to go up the train and cut the air in on two cars, that is, he was ordered and directed by said conductor to couple the air hose through the train, the said air hose reaching transversely from one car across the railroad track to the other car, and in order to the use and benefit of the air it is necessary that the two ends of the said air hose should be coupled together, and for the purpose of coupling the ends of the two air hose together it is necessary to go in between the cars and upon the railroad track and between the rails. That the said conductor Griffin was in the exclusive charge of said train, which consisted of a large number of freight cars and three engines, two in front and one behind. That the said conductor was placed in charge of said train by the defendant, and that he had exclusive control of all three of said engines and the entire train, and all of the employees about said train which consisted of firemen, engineers and brakemen were subject to the orders and control of the said conductor Griffin. That the said con-
3 ductor Griffin had authority to order and signal said train when it should start and when it should stop, and that all other employees were bound to obey the signals and orders given by the said conductor Griffin. That the said train, on the 6th day of February, 1899, at the time the plaintiff was injured, as hereinafter set forth, was out on the road en route at a siding called Lalabor, and that there was no one else present at that time representing the defendant, The Mexican Central Railway Company, Limited, except the said conductor Griffin. That when the said conductor Griffin gave the said Alfonso Huesselmann the order to couple the ends of said air hose together, it was his duty to obey said order, and in obedience to said order he went in between two of the cars and was kneeling down on the railroad track between the rails in the act of coupling the ends of said air hose together, as it was his duty to do, and that being the only way in which the coupling could be made, the said conductor Griffin gave the engineer a signal to back said train in on the switch without giving said Alfonso Huesselmann any warning or notice of his intention to give said signal. That said Alfonso Huesselmann had coupled the ends of said air hose together and was in the act of arising from his kneeling position when the train started to back in upon said siding in obedience to the signal of the said conductor, as aforesaid. That at the time the said conductor gave the said Huesselmann the order to couple said air hose together, said train was standing still, and

the said Huesselmann had no reason to believe or suppose that the said conductor would give a signal for the purpose of causing said train to be moved, without giving him timely warning and enable him to come out from between said cars.

That the said conductor knew that it was necessary for the said Huesselmann to go in between said cars in order to enable him to obey the order of said conductor, and to enable him to couple the ends of said air hose together, and that the said conductor knew at the time he gave the engineer said signal to back said train that he, the said Huesselmann, was in between said cars for the
4 purpose of executing the order which the said conductor had just given him. That in going between said cars and in coupling the ends of said air hose together, he was in the exercise of due and proper diligence for his own safety, and was entirely without contributory negligence. That his injuries hereinafter complained of were caused solely by and through the negligence and imprudence of the said conductor in causing said train to be started without giving him notice of his intention to do so in time to have enabled him to come out from between said cars.

That when said train was started, in pursuance of the signal of the said conductor, one of the cars struck the said Huesselmann and knocked him down and ran over his right leg, and so badly crushed, mangled and bruised the same that it became necessary to amputate the same, which was done about four inches below the right knee-joint. That it was so mashed and mangled that it became necessary to amputate the same twice. That the first amputation was not sufficient, and it became necessary to amputate the said limb a second time. That by reason of the injuries aforesaid the said Huesselmann suffered great and irreparable injury, and suffered great physical and mental pain in consequence thereof, and has been rendered a cripple for life, and his ability to earn money as a railroad employee has been entirely destroyed, and his ability to earn money in other respects greatly and permanently lessened. That by reason of his said injuries he was confined to the hospital eight or nine months, during all of which time he suffered great pain, and that during all that time his time was a total loss to him. That at the time he was injured he was eighteen years of age and was earning about $60 a month Mexican money, which would be about $35 per month in American money. That the said conductor, on the occasion when the said Huesselmann was injured represented the defendant, The Mexican Central Railway Company, Limited, and the order given to the plaintiff to couple the ends of said air hose, and the signal given by the said conductor to the said engineer to back said train, by which the said Huesselmann was injured,
5 as aforesaid, were done in the service for which the said conductor Griffin was employed by the defendant.

That in consequence of the said injuries herein complained of, the said Huesselmann has been damaged in the sum of fifteen thousand dollars.

That he, the said Huesselmann, is a minor under the age of twenty-one years, and is not therefore legally capacitated to sue and

recover his said damages in his own name, and the said J. W. Eckman as his guardian prays permission to file this petition in this honorable court on behalf of the said minor Huesselmann, and that on final hearing hereof judgment shall be rendered in his favor as guardian of the said Huesselmann and for the use and benefit of the said Huesselmann, for the injuries he has sustained, as aforesaid.

Plaintiff further alleges that by the laws of Mexico which now exist, and which existed and were in force at the time and place of the happening of said injuries, through defendant's negligence and imprudence, as aforesaid, and through the negligence and imprudence of the said conductor Griffin, the said Huesselmann has and had a right of action against defendant for his damages. And he says that the following were the laws of Mexico, and are now the laws of Mexico applicable in this case out of which his said right of action accrued, and by virtue of which the same now exists in the said Republic of Mexico; which said laws the said plaintiff specially pleads in this action, and hereby makes the same a part of this petition, viz:

From the federal constitution of the Mexican United States:

Art. 72. Congress has power: * * * XXII. To enact laws governing the general lines of communication, and governing post-offices and mails.

Art. 97. The federal courts have jurisdiction: 1. Of all questions growing out of the execution and application of the federal laws, except when the application of the law only affects interests of individuals, in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code of Mexico:

Art. 4. A crime is a voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes, and crimes resulting from neglect.

Art. 11. Negligent crimes exist—I. Where an act is done or a duty omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * III. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstances, through not having previously made the investigations which the duty of his profession or the importance of the case demands.

Same code, Book Second: Civil liability in criminal matters:

Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1), restitution, (2) reparation, (3) indemni-zation, and (4) payment of judicial expenses.

Art. 304. Reparation comprehends: The payment of all
7 the damages caused to the injured party, to his family, or to a third person, for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemni-zation imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing, and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemni-zation or subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigationg the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on the other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the criminal laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

Art. 310. The right of civil responsibility forms part of
8 the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 315, as directly damaged. Consequently, such action forms no part of the estate of the deceased, nor is it extinguished although the latter pardon the offense in life.

Art. 313. The judges who take cognizance of suits based upon

civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed.

Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which in the opinion of competent persons he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

9 Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed, or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

Art. 325. The provisions of the foregoing articles for computing the civil responsibility for the wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven: that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 325 and 327, it is an indispensable condition that the act or omissions of

the clerks or servants, causing the liability, shall occur in the service for which they were employed.

Art. 331. Under the condition of the preceding article those liable are * * * railroad companies.

10 Art. 363. (Limitation.) The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution but for reparation of damages, or indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory law. Penal Code:

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding in suits to enforce civil liability, the following rules shall be observed * * * V. Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceedings in the former shall be stayed.

From the Federal Civil Code:

Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged.

Art. 20. When a judicial controversy can be decided

11 neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties.

Art. 1095. Limitation bars in three years * * * VIII. Civil responsibility for injuries, whether done by word or by writing and that which arises from damage caused by persons or animals, and

which the law imposes upon the representatives of such persons or the owners of the animals.

Act of Congress of December 16th, 1881:

Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed upon Mexican territory, according to the following bases:

I. Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch at any point in the territorial boundary line of the Republic and foreign countries or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction XXII, of art. 72 of the constitution.

II. Those general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * *

G. Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines.

H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation.

From the regulations for the construction, maintenance and operation of railroads:

Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

Art. 83. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman.

Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * *

Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward.

Art. 124. Companies (railroad) are liable for accidents which occur through the failure to observe the provisions of this chapter (chap. 7), respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals.

Art. 184. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees.

Art. 298. All violations of this law, which companies (railway) commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the Department of Public Works shall assess, reserving always the right of individuals,

through indemnity, and the liability which the companies
13 may have incurred through criminal acts or omissions committed by them.

Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occur-ence of the accident hereinbefore mentioned and now has, a right of action for his damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the United States of America, and he says that the acts of negligence upon the part of the defendant and its said conductor complained of herein, were wrongful and actionable as has been hereinbefore shown by the plaintiff, in the Republic of Mexico at the time of the accident complained of and are now so, and he says that the same were then and are now wrongful and actionable in the United States of America and in the State of Texas. And the plaintiff says that by reason of the injuries received by the said Alfonso Huesselmann, he, the said Huesselmann, has suffered and sustained damages in the sum of fifteen thousand dollars, as aforesaid, for which sum he sues.

Wherefore he prays for citation and for judgment for said sum of fifteen thousand dollars, costs of suit and general relief.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for the Plaintiff.

(Indorsement:) No. 261. In the United States circuit court for the western district of Texas, El Paso division. J. W. Eckman, who sues as guardian of Alfonso Huesselman, *vs.* The Mexican Central Railway Company, Limited. Plaintiff's original petition. Filed this 5th day of March, 1900. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Amended Plea in Abatement.

Filed Oct. 1st, 1900.

14 In the United States Circuit Court, Western District of Texas, El Paso, Texas, October Term, A. D. 1900.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., Limited. } No. 261.

Now comes defendant, Mexican Central Railway Company, Limited, and with notice and leave of the court, amends its plea in abatement and privilege to be sued in the district of which it is an inhabitant, and for amendment says:

Defendant, appearing herein for the purpose of pleading to the jurisdiction of the court, comes and says that the actual plaintiff herein Alphonso Huesselman, who brings this suit through one J. W. Eckman as his guardian, was not, at the time of the filing of this suit, and is not now, a citizen or resident of this State and district, and that defendant, Mexican Central Railway Company,

Limited, is not a citizen or resident of this State and district. That said Alphonso Huesselman, at the time of the filing of this suit, was eighteen years of age, and then, and now, was and is a minor; that the father and mother of said Huesselman, at the time of the filing of this suit, and ever since said time and now, were and are residents and citizens of the State of Illinois and not of the State of Texas; that though it be a fact that J. W. Eckman, who purports to be guardian of said Huesselman, is a resident and citizen of this State and district, plaintiff, for the purpose of wrongfully conferring upon this court jurisdiction of the controversy and suing this defendant out of its habitat and place of residence, caused this suit to be brought in the name of said Eckman as his guardian, when, as a matter of fact, said Huesselman was at the filing of said suit and is now a resident and citizen of the State of Illinois, in which State his parents reside. That defendant, Mexican Central Railway Company, Limited, was at the time of the filing of this suit, and
15 is now a resident and citizen of the State of Massachusetts, and not of this State; that the defendant is not incorporated under the laws of the State of Texas and does not reside within this State, but was incorporated solely under the laws of the State of Massachusetts, of which State it is a resident, citizen and inhabitant.

Defendant further says that it has in no way waived its right to be sued in the State of which it is an inhabitant, or consented to the jurisdiction of this court.

Wherefore defendant says that it pleads its right to be sued in the State of which it is an inhabitant and asks that this suit be dismissed.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED,
By FALVEY & DAVIS, *Its Attorneys.*

UNITED STATES OF AMERICA, }
Western District of Texas. }

Before me, the undersigned authority, on this day personally appeared Waters Davis, one of the attorneys for defendant in the above styled and numbered cause, who, after being by me duly sworn, on oath says that the facts set forth in the foregoing plea are within his knowledge true and correct.

WATERS DAVIS.

Subscribed and sworn to before me this 1st day of October, A. D. 1900.

D. H. HART, *Clerk,*
By J. P. HODGSON, *Dep.*

(Indorsement:) No. 261. In U. S. circuit ct. J. W. Eckman, guar., *vs.* M. C. R'y Co., Lim. Defendant's amended plea of privilege to be sued in State of its residence. Filed Octo. 1st, 1900. D. H. Hart, clerk. By J. P. Hodgson, d'y. Falvey & Davis, att'ys for def't.

16 *Plaintiff's Exception to Defendant's Amended Plea in Abatement.*

Filed October 1st, 1900.

J. W. ECKMAN, Guardian, etc.,
v.
THE MEXICAN CENTRAL R'Y CO., LIMITED. } No. 261.

Now comes the plaintiff and demurrers and excepts to the defendant's amended plea in abatement filed in this cause by the defendant on Oct. 1, 1900, because the same is insufficient in law and presents no reason why this cause should be abated or why this court has not jurisdiction of this cause.

Wherefore, he prays judgment of the court.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for Plaintiff.

(Indorsement:) J. W. Eckman, guardian &c. *v.* The Mexican Central R'y Co., Limited. Exception to plea in abatement. Filed Octo. 1st, 1900. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Order Sustaining Plaintiff's Exception to Defendant's Amended Plea in Abatement.

Entered October 1st, 1900.

In the United States Circuit Court, Western District of Texas, El Paso, Texas, October Term, A. D. 1900.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 261.

17 On this, the 1st day of October, A. D. 1900, in the above-styled cause, came on to be heard plaintiff's demurrer and exception to the plea in abatement heretofore filed by defendant, and the court, after hearing the same, and being fully advised in the premises, does sustain said demurrer and exception, and finds that said plea in abatement presents no reason why this cause should be abated, or why this court has no jurisdiction of the cause.

Defendant's Original Answer.

Filed October 1st, 1901.

In the United States Circuit Court for the Western District of Texas.
October Term, A. D. 1900.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 261.

Now comes defendant in the above styled and numbered cause, after its plea of privilege has been overruled by the court, and saving all manner of exception thereto, for answer herein says:

Defendant comes and pleads to the jurisdiction of this court, and for further ground for said plea, presents and shows to the court:

First. That the laws of the Republic of Mexico, upon which the rights and liabilities of the parties hereto rest and are to be determined, are so vague, uncertain and dissimilar to the laws of our country that this court should not entertain jurisdiction herein and attempt to enforce the rights of the parties thereunder; that said laws have been passed upon by the decision of the supreme court of the State of Texas, to wit: in the case of The Mexican National Railway Co., *vs.* James O. Jackson, it being therein held that the courts of this State would not sit to adjudicate controversies like the one at bar, under the laws of the said Republic of Mexico, on account of their dissimilarity to our laws, and that the
18 policy of this State and the courts of this country would be to not interfere with the traffic of railroads having their lines in Mexico by adjudicating cases arising in Mexico; wherefore, defendant says that under the statutes of the United States of America fixing the jurisdiction of the circuit courts of the United States, and that part where it is said:

"That the circuit courts of the United States shall have original cognizance *concurrent with the courts of the several States* of all suits of a civil nature, at common law or in equity * * * . (3.) Or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value," etc.

this court has no jurisdiction of this controversy for the reason that there is no concurrence by the courts of the State of Texas, the courts of this State having refused to take cognizance of such controversies.

Second. Plaintiff's cause of action, if any he has, having arisen in the Republic of Mexico, it would be controlled by the laws of said Republic, and it appears that said defendant, ever since plaintiff claims he was injured, has maintained its line of railroad in said Republic and continued to possess its property therein, and there is no good reason shown in said petition why plaintiff did not sue for

damages for said injuries in said Republic where his cause of action accrued, instead of bringing his suit in this court.

Third. It appears from the laws of Mexico, as set out in plaintiff's petition, that if plaintiff has any cause of action, it would be controlled by the laws of the Republic of Mexico; that according to said laws, as set out in plaintiff's petition, the suit and adjudication of the rights of plaintiff, and the awarding of damages to the
19 plaintiff for the injuries sustained, would not be a final termin*ta*ion of the controversy between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time and recover in said suits if said injury is continuing or permanent.

Fourth. That according to article 313 of the laws of said Republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect a compromise, so that the amount and terms of payment be fixed by agreement between the parties; that according to said law, no right of action would accrue to the plaintiff until after the judge who took cognizance of the case shall endeavor that the amount and terms of payment be fixed by agreement between the parties; that said petition fails to show that the judge of this court, or any other judge having cognizance of said matter, had endeavored to have the amount and terms of payment for such injuries agreed upon between the parties.

Fifth. That according to the laws of said Republic, as set out in said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries, unless he shows that the acts of defendant which caused the injury constituted a crime under the said laws of Mexico; that the recovery in a civil suit is penal in its nature; that this court cannot enforce the penal laws of the Republic of Mexico.

Sixth. That according to article 323 of the laws of the said Republic of Mexico, a recovery may be had not only for the damages sustained by the injury complained of, but the judge trying the case may award as extraordinary indemnity, any sum that he may determine, considering the social position, etc., of the party injured; that said law is against natural justice and the policy of our laws in discriminating in favor of or against a litigant according to his social position.

Seventh. Defendant further says that the contract of service entered into by plaintiff and defendant herein was made in the Republic of Mexico; that plaintiff's service thereunder was to be performed in said Republic, where his wages and hire were to be paid;
20 that plaintiff's cause of action, if any he has, arose entirely within said Republic of Mexico, where defendant now and always has had and operated its railroad and business, and where all its cars and property are kept—it being at the time plaintiff claims he was injured and at all times since said date, subject to the jurisdiction of the courts of said Republic of Mexico; that actions and suits in said Republic of Mexico are not governed by the common law, but that all rights, remedies and actions are entirely provided for and governed by the code and statutory laws of said Republic,

which materially alter and change the common-law rule; that under the codes and statutes of said Republic, plaintiff would not be entitled to recover for injuries sustained by him as claimed in his petition, unless the acts of defendant causing such injuries are shown by plaintiff to constitute a crime under the penal code of said Republic; that no civil action would accrue to plaintiff in said Republic for such acts of defendant as set out in plaintiff's petition—such acts not being penal under the laws of said Republic.

Wherefore, defendant says that this court has no jurisdiction herein, and wherefore it prays that it be discharged with its costs.

FALVEY & DAVIS,
Attorneys for Defendant.

Without waiving the foregoing pleas to the jurisdiction of the court, in case the same should be overruled by the court, defendant still insisting upon the same, comes and says:

First. That defendant excepts to the allegations of plaintiff's petition and says that the same are not sufficient in law and fail to show a cause of action, and of this defendant prays judgment of the court.

FALVEY & DAVIS,
Attorneys for Defendant.

21 Second. Defendant, by its attorneys, comes and denies all and singular the allegations of said petition, and of this puts itself upon the country.

FALVEY & DAVIS,
Attorneys for Defendant.

(Indorsement:) #261. In U. S. circuit court. J. W. Eckman, guardian for Alfonso Huesselman, *vs.* Mexican Central Railway Company, Lim. Defendant's original answer. Filed this 1st day of Octo., 1900. D. H. Hart, clerk. By J. P. Hodgson, deputy. Falvey & Davis, att'ys for def't.

Plaintiff's Demurrer to the Defendant's Plea to Jurisdiction Contained in Answer.

Filed April 2nd, 1901.

J. W. ECKMAN, Guardian, etc.,
vs.
THE MEXICAN CENTRAL R'Y CO., LIMITED.

Now comes the plaintiff and excepts to the answer of the defendant, in so far as it consists of the various pleas to the jurisdiction of this court to hear and determine the cause, because said answer and pleas *so* no reason why this court should not try this case. Wherefore he prays the judgment of the court.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for Plaintiff.

(Indorsement:) No. 261. J. W. Eckman, guardian, etc., *vs.* The Mexican Central Railway Co., Limited. Plaintiff's demurrers to the defendant's pleas to jurisdiction contained in answer. Filed April 2, 1901. D. H. Hart, clerk, by J. P. Hodgson, deputy.

22 *Defendant's Request for Charge to Jury.*

Filed April 4th, 1901.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

Defendant in the above styled and numbered cause request the court to charge the jury that the evidence making it apparent herein that plaintiff was injured through the negligence of a fellow-servant of plaintiff, and that under the law defendant would not be liable, and you are therefore charged to find for defendant.

FALVEY & DAVIS,
Att'ys for Def't.

Refused.
T. S. MAXEY, *Judge.*

(Indorsement:) No. 261. J. W. Eckman, guardian of Alphonso Huesselman, *vs.* The Mexican Central Railway Company, Limited. Defendant's request for charge to jury. Filed April 4, 1901. D. H. Hart, clerk. By —— ——, deputy.

Judgment.

Entered April 4th, 1901.

J. W. ECKMAN, Guardian,
vs.
MEX. CENTRAL R'Y CO., LTD.

On this day, to wit: April 4th, 1901, the above styled and numbered cause was duly called for trial, then came on to be heard the defendant's plea in abatement based upon the ground that the residence of the parents of the minor, Huesselman, which was shown to be in the State of Illinois, and not the residence of his guardian, Eckman, which was shown to be in El Paso county, Texas, would control the jurisdiction, was duly heard by the court, and after being so heard was overruled by the court, to which ruling
23 of the court the defendant then and there (and while the jury were in the box) excepted, and saved its bill of exceptions. Also defendant's several pleas to the jurisdiction of the court were duly heard by the court, and after which hearing, the same, and all of them, were by the court overruled, to which ruling of the court the defendant then and there in open court, while the jury were in the box, duly excepted and saved its proper bill of exceptions.

Whereupon came the parties by their respective attorneys and announced ready for trial, whereupon a jury was empaneled and sworn, consisting of Z. T. White, foreman, and eleven others, who, after hearing the evidence and charge of the court, returned into court the following verdict: "We, the jury, find for the plaintiff, and assess his damages at fifteen thousand dollars. Z. T. White, foreman."

It is therefore ordered, adjudged and decreed by the court that the plaintiff, J. W. Eckman, as guardian of Alphonso Huesselmann, do have and recover of and from the defendant, The Mexican Central Railway Company, Limited, the said sum of fifteen thousand ($15,000.00) dollars, together with all costs of suit in this behalf expended, for all of which let execution issue.

Defendant's 3rd Bill of Exceptions.

Filed April 15th, 1901.

In the United States Circuit Court, Western District of Texas, El Paso, Texas, April Term, A. D. 1901.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 261.

Be it remembered that in the above styled and numbered cause, defendant filed its "amended plea of privilege to be sued in the State of its residence," as follows:

21 "Now comes defendant, Mexican Central Railway Company, Limited, and with notice and leave of the court, amends its plea in abatement and privilege to be sued in the district of which it is an inhabitant, and for amendment says:

Defendant, appearing herein for the purpose of pleading to the jurisdiction of the court, comes and says that the actual plaintiff herein, Alphonso Huesselman, who brings this suit through one J. W. Eckman as his guardian, was not, at the time of the filing of this suit, and is not now, a citizen or resident of this State and district. That said Alphonso Huesselman, at the time of the filing of this suit, was eighteen years of age, and then and now was and is a minor; that the father and mother of said Huesselman, at the time of the filing of this suit, and ever since said time and now, were and are residents and citizens of the State of Illinois, and not of the State of Texas; that though it be a fact that J. W. Eckman, who purports to be guardian of said Huesselman is a resident and citizen of this State and district, plaintiff, for the purpose of wrongfully conferring upon this court jurisdiction of this controversy, and suing this defendant out of its habitat and place of residence, caused this suit to — brought in the name of said Eckman as his guardian, when, as a matter of fact, said Huesselman was, at the filing of said suit, and is now, a resident and citizen of the State of Illinois, in which State his parents reside. That defendant, Mexican Central Railway Company, Lim-

ited, was, at the time of the filing of this suit, and is now a resident and citizen of the State of Massachusetts, and not of the State of Texas; that the defendant is not incorporated under the laws of the State of Texas, and does not reside within this State, but was incorporated solely under the laws of the State of Massachusetts, of which State it is a resident, citizen and inhabitant.

Defendant further says that it has in no way waived its right to be sued in the State of which it is an inhabitant, or consented to the jurisdiction of this court.

Wherefore, defendant says that it pleads its right to be sued in
25 the State of which it is an inhabitant and asks that this suit be dismissed.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED,
By FALVEY & DAVIS, *Its Attorneys.*

UNITED STATES OF AMERICA, }
Western District of Texas. }

Before me, the undersigned authority, on this day personally appeared Waters Davis, one of the attorneys for defendant in the above styled and numbered cause, who, after being by me duly sworn, on oath says, that the facts set forth in the foregoing plea are within his knowledge true and correct.

WATERS DAVIS.

Subscribed and sworn to before me this 1st day of October, A. D. 1900.

D. H. HART, *Clerk*,
[SEAL.] By J. P. HODGSON, *Dy.*"

That plaintiff thereupon filed the following exceptions to said plea in abatement as follows:

"Now comes the plaintiff and demurs and excepts to the defendant's amended plea in abatement filed in this cause by the defendant on October 1, 1900, because the same is insufficient in law, and presents no reason why this cause should be abated, or why this court has not jurisdiction of this cause.

Wherefore, he prays judgment of the court."

That on the 4th day of April, A. D. 1901, at a regular term of said court, said plea again coming on to be heard, upon plaintiff's demurrer above set out, the court then and there sustained said demurrer or exception, as shown by the order of the court as follows:

On this day, to wit: April 4th, 1901, the above styled and numbered cause was duly called for trial, then came on to be heard the defendant's plea in abatement based upon the ground that
26 the residence of the parents of the minor Huesselman, which was shown to be in the State of Illinois, and not the residence of his guardian, Eckman, which was shown to be in El Paso county, Texas, would control the jurisdiction, was heard by the court, and after being so heard, was overruled by the court, to which ruling of

the court the defendant then and there in open court excepted, and now herewith tenders this its bill of exceptions, and asks that the same be allowed, signed, sealed and enrolled, and made a part of the record herein, which is accordingly done this 15th day of April, A. D. 1901.

T. S. MAXEY, *Judge.*

(Indorsement:) No. 261. J. W. Eckman, guardian of Alfonso Husselman, *vs.* The Mexican Central Railway Company, Limited. Defendant's 3rd bill of exceptions. Filed this 15th day of Ap'l, 1901. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Defendant's 4th Bill of Exceptions.

Filed April 15th, 1901.

In United States Circuit Court, Western District of Texas, at El Paso, Texas, April Term, A. D. 1901.

J. W. ECKMAN, Guardian of Alphonso Huesselmann, *vs.* MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

Be it remembered that in the above styled and numbered cause plaintiff, among other things in his petition, averred the following:

"Plaintiff further alleges that by the laws of Mexico which now exist, and which existed and were in force at the time and place of the happening of said injuries, through defendant's negligence and imprudence, as aforesaid, and through the negligence and imprudence of said conductor Griffin, the said Huesselmann has

27 and had a right of action against defendant for his damages. And he says that the following were the laws of Mexico, and are now the laws of Mexico applicable in this case out of which his said right of action accrued, and by virtue of which the same now exists in said Republic of Mexico; which said laws the said plaintiff specially pleads in this action, and hereby makes the same a part of this petition, viz:

From the federal constitution of the Mexican United States:

Art. 72. Congress has power: * * * XXII. To enact laws governing the general lines of communication, and governing post-offices and mails.

Art. 97. The federal courts have jurisdiction: 1. Of all questions growing out of the execution and application of the federal laws, except when the application of the law only effects interests of individuals, in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code of Mexico:

Art. 4. A crime is a voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes, and crimes resulting from neglect.

Art. 11. Negligent crimes exist—I. Where an act is done or a duty omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess *to* art or science necessary to be known, and acts
28 when impelled by the gravity and urgency of the case. * * *

III. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstances, through not having previously made the investigations which the duty of his profession or the importance of the case demands.

Same code, Book Second: Civil liability in criminal matters:

Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemni-zation, and (4) payment of judicial expenses.

Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemni-zation imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing, and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemni-zation or subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the
29 purpose of investigating the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its pro-

visions extend; on other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the criminal laws which may be in effect at the time of the happening of the act of omission causing the civil responsibility.

Art. 310. The right of civil responsibility forms part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be considered as remitted.

Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 315, as directly damaged. Consequently, such action forms no part of the estate of the deceased, nor is it extinguished although the latter pardon the offense in life.

Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed.

Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which in the opinion of competent persons he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

Art. 325. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

Art. 325. The provisions of the foregoing articles for computing

the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

Art. 326. No person can be charged with civil liability upon an act or omission contrary to the penal law, unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought
31 to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 325 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability, shall occur in the service for which they were employed.

Art. 331. Under the condition of the preceding article those liable are: * * * railroad companies.

Art. 363. (Limitation.) The various actions by which the civil responsibility may be condemned, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code, according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, or indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal pro-
32 ceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory law. Penal Code.

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * V. Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceedings in the former shall be stayed.

From the Federal Civil Code:

Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged.

Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

Art. 21. In case of a conflict of rights and the absence of express law for especial case, the controversy shall be decided in favor of him who seeks to avoid damages and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties.

Art. 1095. Limitation bars in three years: * * * VIII. Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals.

Act of Congress of Dec. 16th, 1881:

Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed upon Mexican territory, according to the following bases:

33 I. Railroads, telegraphs, and telephones which, in the federal district and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch at any point in the territorial boundary line of the Republic and foreign countries or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction XXII of art. 72 of the constitution.

II. These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * *

G. Construction and repair of works. Crimes committed against the security or integrity of the works or against the operation of the lines.

H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation.

From the regulation for the construction, maintenance and operation of railroads:

Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

Art. 83. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman.

Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three

blasts or sounds of the whistle shall be the signal that the entire train is going to move backward.

34 Art. 124. Companies (railroad) are liable for accidents which occur through the failure to observe the provisions of this chapter (chap. 7), respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals.

Art. 184. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees.

Art. 298. All violations of this law, which companies (railway) commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the Department of Public Works shall assess, reserving always the rights of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them.

Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occurrence of the accident hereinbefore mentioned and now has, a right of action for his damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the United States of America, and he says that the acts of negligence upon the part of the defendant and its said conductor, complained of herein, were wrongful and actionable as hereinbefore shown by the plaintiff, in the Republic of Mexico at the time of the accident complained of and are now so, and he says that the same were then and are now wrongful and actionable in the United States of America and in the State of Texas. And the plaintiff says that by reason of the injuries received by the said Alfonso Huesselmann, he, the said Huesselmann, has suffered and sustained damages in the sum of fifteen thousand dollars, as aforesaid, for which sum he sues.

Wherefore he prays for citation and for judgment for said sum of fifteen thousand dollars, costs of suit and general relief."

That defendant, by its original answer, set up the follow-

35 ing pleas or exceptions to the jurisdiction of the court:

"Now comes the defendant in the above styled and numbered cause, after its plea of privilege has been overruled by the court, and, saving all manner of exception thereto, for answer herein says:

Defendant comes and pleads to the jurisdiction of this court, and for further ground for said plea, presents and shows to the court:

First. That the laws of the Republic of Mexico, upon which the rights and liabilities of the parties hereto rest and are to be determined, are so vague, uncertain and dissimilar to the laws of our country that this court should not entertain jurisdiction herein and attempt to enforce the rights of the parties thereunder; that said laws have been passed upon by the decision of the supreme court of the State of Texas, to wit: in the case of The Mexican National Railway Co. *vs.* James O. Jackson, it being therein held that the

courts of this State would not sit to adjudicate controversies like the one at bar, under the laws of the said Republic of Mexico, on account of their dissimilarity to our laws, and the policy of this State and the courts of this country would be not to interfere with the traffic of railroads having their lines in Mexico by adjudicating cases arising in Mexico; wherefore defendant says that under the statutes of the United States of America fixing the jurisdiction of the circuit courts of the United States, and that part where it is said:

'That the circuit courts of the United States shall have original cognizance *concurrent with the courts of the several States* of all suits of a civil nature, at common law or in equity * * * (3) Or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value,' etc.,

this court has no jurisdiction of this controversy for the
36 reason that there is no concurrence by the courts of the State of Texas, the courts of this State having refused to take cognizance of such controversies.

Second. Plaintiff's cause of action, if any he has, having arisen in the Republic of Mexico, it would be controlled by the laws of said Republic, and it appears that said defendant, ever since plaintiff claims he was injured, has maintained its line of railroad in said Republic and continued to possess its property therein, and there is no good reason shown in said petition why plaintiff did not sue for damages for said injuries in said Republic, where his cause of action accrued, instead of bring- his suit in this court.

Third. It appears from the laws of Mexico, as set out in plaintiff's petition, that if the plaintiff has any cause of action, it would be controlled by the laws of the Republic of Mexico; that according to said laws, as set out in plaintiff's petition, the suit and adjudication of the rights of plaintiff, and the awarding of damages to the plaintiff for the injuries sustained, would not be a final termination of the controversy between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time and recover in said suits if said injury is continuing or permanent.

Fourth. That according to article 313 of the laws of said Republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect a compromise, so that the amount and terms of payment be fixed by agreement between the parties; that according to said law, no right of action would accrue to the plaintiff until after the judge who took cognizance of the case shall endeavor that the amount and terms of payment be fixed by agreement between the parties; that said petition fails to show that the judge of this court, or any other judge having cognizance of said matter had endeavored to have the amount and terms of payment for such injuries agreed upon between the parties.

Fifth. That according to the laws of said Republic, as set
37 out in said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries, unless he

shows that the acts of defendant which caused the injury constituted a crime under the said laws of Mexico; that the recovery in a civil suit is penal in its nature; that this court cannot enforce the penal laws of the Republic of Mexico.

Sixth. That according to article 323 of the laws of the said Republic of Mexico, a recovery may be had not only for the damages sustained by the injury complained of, but the judge trying the case may award as extraordinary indemnity any sum that he may determine, considering the social position, etc., of the party injured; that said law is against natural justice and the policy of our laws in discriminating in favor of or against a litigant according to his social position.

Seventh. Defendant further says that the contract of service entered into by plaintiff and defendant herein was made in the Republic of Mexico; that plaintiff's service thereunder was to be performed in said Republic, where his hire and wages were to be paid; that plaintiff's cause of action, if any he has, arose entirely within the Republic of Mexico, where defendant now and always has had and operated its railroad and business, and where all its cars and property are kept—it being at the time plaintiff claims he was injured and at all times since said date, subject to the jurisdiction of the courts of said Republic of Mexico; that actions and suits in said Republic of Mexico are not governed by the common law, but that all rights, remedies and actions are entirely provided for and governed by the code and statutory laws of said Republic, which materially alter and change the common-law rule; that under the codes and statutes of said Republic, plaintiff would not be entitled to recover for injuries sustained by him as claimed in his petition, unless the acts of defendant causing such injuries are shown by plaintiff to constitute a crime under the penal code of said Republic; that no civil action would accrue to plaintiff in said Republic for such acts of defendant as set out in plaintiff's petition—such acts not being penal under the laws of said Republic.

38 Wherefore, defendant says that this court has no jurisdiction herein, and

Wherefore, it prays that it be discharged with its costs."

To said seven pleas and exceptions plaintiff filed his demurrer as follows:

"Now comes the plaintiff and excepts to the answer of the defendant in so far as it consists of the various pleas to the jurisdiction of this court to hear and determine the cause, because said answer and pleas *so* no reason why this court should not try this case.

Wherefore, he prays the judgment of the court."

That on the 4th day of April, 1901, said demurrer coming on to be heard, the court made the following order:

"Defendant's seven pleas to the jurisdiction of the court were duly heard by the court, and after which hearing, the same, and all of them, were by the court overruled, to which ruling of the court the defendant then and there in open court, and while the jury were in the box, duly excepted."

To which ruling of the court in sustaining plaintiff's demurrer

to defendant's said seven pleas or exceptions to the jurisdiction of the court, defendant then and there in open court excepted, and now herewith tenders this its second bill of exceptions and asks that the same be allowed, signed, sealed and enrolled, and made a part of the record herein, which is accordingly done this 15th day of April, 1901.

T. S. MAXEY,
Judge U. S. Cir. Court, W. D. T. of Texas.

O K.—
P. & B.

(Indorsement:) No. 261. J. W. Eckman, guardian of Alfonso Husselman, *vs.* The Mex. Central R'y Company, Limited. Dfdts.' 4th bill of exceptions. Filed this 15th day of Ap'l, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

39 *Defendant's 5th Bill of Exceptions.*

Filed April 15th, 1901.

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, April Term, A. D. 1901.

J. W. ECKMAN, Guardian of Alphonso Huesselmann, Plaintiff,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED, Defendant. } No. 261.

Be it remembered that upon the trial of the above styled and numbered cause in said court on the 4th day of April, 1901, the following testimony was offered in evidence, the same being all the testimony that was offered upon the trial of said cause, to wit:

ALFONSO HUESSELMANN, plaintiff, testified in his own behalf as follows:

"My name is Alfonso Huesselmann. I was employed by The Mexican Central Railway Company, the defendant in this case, in the capacity as brakeman on a freight train. I was injured while engaged in the service of the defendant at a place called La Labor. The conductor ordered me to cut in the air on some cars about the middle of the train. As I went up and stepped in between the cars and was in the act of cutting in the air-coupling cars—as I started to stand up the train came back and caught my leg. Two wheels ran over the leg, and as the second wheel passed over I drew my leg off the track and grabbed at the first brake beam; I made a grab at that and missed it, and made a grab at the second and missed it, and grabbed at the third and hung fast to that until the train stopped. I was drug along about a car and a half, and the train ran about three car-lengths. The conductor's name was Griffin. He ordered me to go in the train and couple the air. By coupling the air I mean this: There is a

hose runs under every car, and there is a coupling at the end of the hose to couple up and to run air from one car through to another. These hose are coupled up across the
40 track; one being on one side and one on the other side, extending across underneath. In pursuance to the order, I had gone in there and had just made a coupling when the train started. I did not know the train was going to start; had received no notice of an intention on the part of the conductor to start the train. It was necessary for me to go in between the cars in order to couple the cars, as there was no other way to do it; it was right in the center of the cars. I was eighteen years old at the time this accident happened. When the cars passed over my leg they crushed it, mashed it. It was amputated about the 9th or 10th of February; I was hurt the 6th of February. They put me on the train and we laid over at San Luis Potosi from 10 o'clock that night until 7 the next morning. Never sent the doctor around to see me; got into Aguas Calientes where the hospital is, about one o'clock the next day. When I arrived at the hospital one of the assistant surgeons told me he would have to take the leg off. I was two days at the division. My leg was amputated after I got to the hospital. The bone began to rot after the first amputation, and they had to work on it again. I was in the hospital six months, and after I left the hospital my leg got worse again, and I was in the city about three months, and then went back to the hospital again. That was about eight or nine months altogether. The train was on the main line at the time the conductor ordered me to go in and cut in the air on those cars. The train had come from Tampico. I could not tell exactly where this train stopped on the main line; we fixed up those chains; took up slack out of chain and we uncoupled the car behind, and after taking the slack out of the chain we coupled the cars again. There were three engines attached to the train at that time; two in front and one behind. There were two brakemen besides myself, two conductors, three engineers and three firemen. There was something like 12 or 13 cars, might have been 14. Mr. Griffin, the conductor, had control and management of all those engines, employés and cars at the time I was hurt. I am not
41 now able to pursue the duties of a brakeman on a train. I lost a good deal of time, probably nine months; I was in the hospital laid up nine months. I was earning between $60.00 and $75.00 a month Mexican money."

Cross-examination:

"I do not remember the names of all the engineers, but there was one by the name of Glass. We had three engines, one in rear and two in front. There was a man by the name of Howard, but I am not positive whether Howard was another one of the engineers or not. There were three engines attached to the train. There were 12 or 13 cars in the train, and we had three engines on account of the heavy grade between —— and ——. It was customary to have three engines. There were two brakemen besides myself with the train; three altogether. I was head brakeman. This car was in about the middle of

the train. I was sent by the conductor to couple up; ordered by the conductor to do so, and it was my duty to obey orders. The other brakemen at that time were pretty close around there; I believe one was on the left-hand side of the train and one on the right-hand side about two or three car-lengths from me when I was hurt; toward the rear I think. I believe the other one was on the other side of the train; I am not positive. I do not know where he was standing. There was a grade at that place. We were standing on the main track; the grade was pretty heavy. The conductor at that time was at the rear of the train; I do not know exactly where he was at, but I believe back by the switch; I believe he throwed the switch for the train to back up on to the switch; the switch was about ten car-lengths from me, I guess. The train backed toward the switch when I was hurt. The grade is down toward the switch. I do not know who gave the signal for the train to start; I was busy coupling at the time. As I left the conductor, I walked about five car-lengths after the conductor told me to cut in the air on the cars, and I had my back toward the conductor in walking up there. I do not know whether any one gave a signal for the engineer to back the train or whether he
42 backed the train without a signal. I am pretty sure the train moved with steam, because they moved three car-lengths. I believe there were a couple of hand brakes set when I went in to couple up the air. The brakes were off in the back, I think. The cars being uncoupled, all the brakes except hand brakes that might be set, would not necessarily be off; I believe they were working air from both ends. This air pipe being uncoupled in the middle of the train would not effect the air if the cocks were turned off. I don't know whether any brakes were on the train at that time. I do not know whether the engine whistled or rung a bell while I was in there. The train would not have moved three car-lengths of its own weight down the grade toward the switch. It would have moved until stopped, after starting; I never saw a train that run from itself run so far as that; they usually stop them. This train started up too quick to move from its own weight; a train starting from its own weight would start off slow. I did not hear any steam nor hear any bell ring; as a general rule they blow a whistle or ring a bell, but I did not hear anything. If they had blown a whistle or rung a bell I would have heard it and that would have been notice to me that the train was going to start and to come out of there. I am quite positive they did not blow any whistle. I could not hear steam at that distance; I could hear exhaust. I do not know whether the conductor gave a signal or not. It must have been started by the enginemen; I do not know whether any signal was given or not. There was not steam used in starting the cars because they started too quick to have run off of their own accord."

Redirect examination:

"I have before met the witness by the name of Scheh who has given a deposition; he was there at the time; he was on the rear engine."

Recross-examination:

"I was 18 at the time the accident occurred, and that was February 6th, 1899. My parents reside in Chicago, Illinois; have a father and mother living there. They never lived in El Paso,
43 Texas, or in Texas at all."

L. PH. SCHEH testified by deposition as follows: My name is L. Ph. Scheh, my age 25 years, and I reside in Caldwell county, Texas. I am acquainted with Alphonso Huesselman, and I worked with him in Mexico, on the Mexican Central Railway Company, Limited. I knew of his working for said company, in the Republic of Mexico, in the capacity of brakeman on one of their freight trains under Conductor Griffin, and of his being injured while so in the employ of said company. He was injured by having as many as two cars, as I now remember it, passing over his foot and cutting it off so that it only hung by the skin; we had pulled into a way station and was tryin- to get onto a switch for the passenger train to pass. The train was very heavy and hard to control, and the air on the air brakes had become disconnected somewhere about the middle of the train. The conductor ordered Huesselmann to go in and connect the air. He at first objected, when the conductor became angry and said to him "You damn Dutchman go in there and fix that;" before he got it fixed the conductor signalled the train to move; it did move, and while Huesselmann was trying to get from between the cars one of the wheels caught his foot and cut it off as I have stated. He was trying to couple the air at the time he was injured; while he was so engaged the conductor gave the signal to the engineer by movements of his hands to move the train. He did move it and Huesselmann was caught before he could get from between the cars. I do know of my own knowledge that the signal to move the train was given. The conductor was on the opposite side of the train from where I usually sat on the engine. I was attracted by hearing him cursing and talking in a loud and angry voice. I moved over on that side of the engine, and saw the conductor standing about ten yards from the train. I plainly saw him, after the boy had gone in between the cars to couple the air, give the signal to the engineer to move the train, and at the same time he gave the signal, he hollowed to the engineer "to back up." The engineer moved the train instantly, and the boy
44 was caught as I have stated. I saw the person giving the signal to the engineer to move the train; he was at the time in the employ of the Mexican Central Railway Company, Limited, in the capacity of a conductor, and at the time he gave the signals, was acting in that capacity and had charge of that train, and he gave the signal to the engineer as conductor. As I have stated, the conductor gave the signals to move the train to the engineer, and the engineer at once obeyed the signal and moved the train. The name of the conductor in charge was Griffin, the name of one of the engineers was Tom Glass. We had two engines on that train, and the regular engineer on my engine was not on duty that day, and I do not remember the name of the engineer who was that day

controlling my engine. Griffin was the conductor at the time of the injury; he ordered said Huesselmann in between the cars to couple up the air. He (Griffin) gave the engineers the signal to back said train; the engineers saw said signal and obeyed it. They moved said train suddenly while the said Huesselmann was in between the said cars for the purpose of coupling the air. Huesselmann was hurt by the wheels of the car passing over his foot.

There were two engines attached to the train at the time of the injury, commonly called double-headers. There were seven employés that I now remember with said train, two engineers, two firemen, two brakemen and one conductor. The conductor Griffin was in charge of the whole business at the time of the injury. No person present then had any authority or control over the conductor. A little while afterwards the passenger train came in, and there was on board the road superintendent, and the traveling doctor of the company. I do not know whether these parties had any control over the conductor or not. The doctor looked at the boy, but gave him no assistance; he only shook his head, said "Too bad," and went back to his train, which at once pulled out. I myself requested the d/ctor to take the boy on the train with them to Tampico, which they could have reached some time that evening; he made no reply whatever to my request. We then tried to get Griffin, as the man in authority of the train, to take him in, but he refused to do so, saying that he would be fired as soon as he got in. We then refused to do anything until the boy was carried to Cardenas. They then took one engine (mine) and a caboose, and we carried him into Cardenas, reaching there about two or three o'clock the same day. The conductor has full control and controls the employés, and directs the movement of the engines and cars. It is the duty of the entire crew to obey the orders of the conductor. The conductor gives the signals to the engineer for the movement of the train, and directs all of the employés as to what work they are to do with reference to the running of said train. The train moves when he says for it to move, and it stops when he says for it to stop. The crew do such work in connection with the train as the conductor directs them to do.

Cross-examination:

I was not discharged by the defendant. I quit work when I went in from this trip, for the reason that the firemen were ordered by the foreman to clean the engines; and every white fireman quit work.

LIC. ANDRES HORCASITAS, a witness for plaintiff, testified by deposition as follows:

My name is Andres Horcacitas, married, forty-eight years of age, occupation lawyer, and at present judge of the supreme court of justice of the nation, resident of the city of Mexico and living at # 10 Calle de las Artes. For the last twenty-three years have been an

officer of the administration of justice of the federation, having filled for one year the post of secretary to the circuit court then existing in Mazatlan, State of Sinaloa, for six years the same position in the circuit court of this city, from which post I was promoted to that of judge of the same court, and there remained twelve years, being subsequently promoted to the supreme court of justice of the nation with the character of supernum-ary judge, which
46 office I have filled for four years. During the twelve years that I was circuit judge in this capital, I pronounced a large number of sentences in which I applied the provisions of the decree of the 16″ of December, 1881, in connection with articles 326, 327, 330, 331 of the Penal Code of the Federal district, which is in force all over the Republic as regards offenses against the federation or acts which are submitted to the cognizance of the federal tribunals. In these final sentences, which I pronounced in revision and as court of second instance of the sentences of the district who were under my jurisdiction, I declared: That under the decree of the 16″ December, 1881, the federal courts were competent to take cognizance of the investigations required by railroad accidents, whenever such accidents affected the security or integrity of the works or the service of the railroads, and that such competency extended to inquiries into the responsibility that might fall on the respective companies through such accidents, whether caused directly by the companies or through some of their employés, and this responsibility was enforced in accordance with articles 326, 327, 330 and 331 of the Penal Code of the Federal district, which is in force throughout the Republic, as regards facts such as these in question, and that came under the jurisdiction of the federal courts. I could cite a great number of final sentences of the same tenor, but I consider it sufficient to refer to some of them, confining myself to giving their date and the periodical "Semanario judicial de la federacion" (Weekly Report of Judicial Proceedings) in which there was published, and therefore presents them in the following form: Feb'y 25″, 1885, 2″ period, volume 8, pages 197 and 198; Feb'y 27″, 1886, volume 10, page- 420 to 430; April 29″, 1886, same volume, pages 599 to 602; May 27″, 1886, same volume, pages 696 to 700; June 11″, 1886, same volume, pages 848 to 852; October 27″, 1886, volume 11, pages 334 to 337; March 24,″ 1887, volume 12, pages 215 to 217; November 9″, 1887, volume 13, pages 517 to 520; March 1″, 1888, volume 14, pages 393 to 397; April 9″, 1888, same volume, pages
47 627 to 631; April 9″, 1888, same volume, pages 637 to 645; June 18″, 1888, same volume, pages 1006 to 1018; July 21″, 1888, volume 15, pages 33 to 35; July 21″, 1888, same volume, pages 36 to 40; July 26″, 1888, same volume, pages 41 to 44. Two others of the same date on pages 45 to 47, and 48 to 51, and July 30″, 1888, same volume, pages 52 to 57. August 1″, 1888, same volume, pages 154 to 159. In all these sentences the prosecution for railroad accidents was dismissed, and if the civil liability referred to in articles 326, 327, 330 and 331 of the Civil Code of the Federal district in connection with the decree of 16″ December, 1881, was not enforced,

it was because, as shown in the course of the investigations, neither the railroad company nor their employés were in any way responsible for the events that gave rise to those investigations. It would not be out of place here to make mention of the sentence pronounced on the 10" January, 1889, and published in volume 16 of the Semanario Judicial, second period, pages 20 to 26, in which there is a clear exposition of the cases which come within the jurisdiction of the federal courts, and those that come within that of the ordinary courts, according to the provisions of the decree of the 16" December, 1881, when relating to railroad accidents; and also the final sentence pronounced on the 25" July, 1891, which clearly shows the reason for the dismissal of the case, as ordered by the district judges in these investigations, and which having been confirmed by the respective superior courts, which in this case was the circuit court of this capital, closed the door against all further proceedings against the railroad companies and their respective employés. The reading of these sentences clearly shows the liability under which these railroad companies are as regards the accidents that may occur in the operation of their roads through any fault or negligence on the part of their employés in the service of the roads, and which liability is to be enforced by the district judges in the first instance, and by the respective circuit court in the second instance, according to the jurisdiction within which
48 the accident has taken place. This competency is founded on paragraphs "H" and "I" of section 2 of article 1" of the decree of the 16" December, 1881, in which section 2 we find a detailed statement of all the railroad accidents that come within the jurisdiction of the local courts, and which accidents are those that occur on the railroads that do not connect to municipalities in the federal district and territories, that do not cross the boundaries of the different States of the federation, or that do not touch any port or boundary line of the Republic with a foreign country, and that do not run parallel within a zone of twenty leagues. Those cases which come under federal jurisdiction are subject to the provisions of the federal code of the federal district, and when they come under local jurisdiction they are subject to the penal legislation that is in force in the State in question, it being noted that almost all the States have adopted the penal code of the federal district. If the investigation shows that any employee of the railroad on which the accident has taken place is responsible for it, the corresponding penalty is imposed on him, and it is then that the respective companies can be held civilly liable with articles 326, 327, 330 and 331 of the Civil Code, bearing in mind the provisions of article 337 of the same code. The jurisprudence laid down in the sentences above mentioned has been sanctioned by the supreme court of justice of the nation in the revision of the proceedings with respect to which those sentences were pronounced, seeing that it explicitly declared in each case that no responsibility had been incurred through the proceedings taken in the investigations in question. Although the foregoing would be sufficient to show the approval that the supreme court of justice has given the interpretation of the decree of 16" De-

cember, 1881, it is not out of place to mention a sentence pronounced within the last few days by the supreme court of justice in the suit for "amparo." (Amparo is the protection that is granted by the federal courts to any individual in whose person or interests the constitutional guarantees are claimed to have been violated. It must be confirmed by the supreme court.) This suit was entered
49 in the second district court of this city by Leandro Herrera against the sentence pronounced on the 5" of October, 1889, by the first minor court. In this sentence, which was pronounced on the 14" of January of this year, protection is granted to the claimant on the following judicial considerations: "That the sentence complained of being principally founded on the fact that Herrera did not prove the ownership of the coach, which was damaged by the box car, it is to be observed that outside of the records of the civil suit which he instituted, there is a receipt for the amount of five hundred dollars ($500.00) which he paid for a Troakar coupé, and those of the cabinet-maker and carpenter for the repairs to the coach # 34, and that for the purpose of articles 304 and 305 of the Penal Code, which relate to the owner and to the injured party, it is only necessary to prove the possession of the article which gives rise to the claim, and as the investigation does not require the plaintiff to prove whether or not he was the owner of the article, but only whether the person who caused the damage did or did not render himself liable under article- 327, 326 and 330, section two of the Penal Code, for which reason in taking cognizance of the question of ownership the minor judge clearly infringed article 605 of the Civil Code proceedings, which provides that "the sentence will exclusively refer to the rights claimed, and the exceptions taken in the complaint and answer," thus violating the guarantees set forth in article 14 of the constitution. That the complainant having unquestionably proved his rights as the possessor of public hack # 34 to claim loss and damage against the District Railroad Company for an act caused through one of its employés, there is no reason in the opinion expressed by the first minor judge when he says in his sentence that there is no evidence on which to find a decision in favor of a railroad, because it having been proved in this case that the conditions of article 326 were fulfilled, there can be no question but what the liability of the company under the provisions of article 327 in not declaring so, that said first
50 minor judge clearly neglected to give the proper construction of article- 330 and 331, section 2 of the Penal Code, with which he also infringed the guarantees granted in the above-mentioned article 14 of the constitution." As can be seen, the supreme court of justice of the nation has declared that article- 326, 327, 330 and 331 of the Penal Code are exactly applicable to enforce the civil liability which is incurred by a railroad company through any accident that takes place in the operation of its lines.

In answer to question as to whether or not, under the laws of Mexico, where two men are employed by the same employer or by the same railroad and are engaged in the same common service, and, through the negligence or carelessness of one of the men so

employed, the other receives an injury without any fault upon his part, the courts of the Republic of Mexico hold the master or the railroad company liable for such injury, I will state, that although it would not be easy to designate any sentence in which such a case has been decided, I certainly can assert that according to the articles of the penal code before mentioned, the liability of the railroad company for compensation for loss and damage caused by the negligence of its employés is clearly shown, whether the injured party is a stranger to the company or whether he bears the character of an employee of the same company, as a philosophical study of the law will at once show that the liability of the company cannot be altered by the character of the injured party, unless in the case where he himself is the person to be held liable.

In my opinion, there can be no doubt that articles 326, 327, 330 and 331, and others of the same character in the penal code of the federal district, establish the civil liabilities of the railroad companies for the personal injuries that are caused through the negligence of one of their employés and suffered by another employé of the same company, and that the same rules are laid down in the penal legislation of the States of the federation, which, as already stated,
have almost all adopted the same penal code, whilst those
51 which have enacted different penal laws do not make any
provision on this point different to those of the federal district.

Although it is in the interrogatory stated that the law of December 16", 1881, article 53, establishes that "the conductor of a train in service is the head of all the employés handling the same, including the engineer and fireman," said law does — contain any such disposition, and it was doubtless intended to cite article 83 of the regulations of July 1", 1883, for the construction, maintenance and operation of railways, decreed by the federal executive, in exercise of its constitutional rights, and in conformity with article I of the said law; but this disposition, having for its sole object to determine who, in a train of operation, is the chief of the company employés on the said train, does not, by itself, nor in relation to article 184 of the said regulations, to which possibly the clauses in this interrogatory are intended to refer, inasmuch as #194, which is cited, has no connection with the matter, touch the civil responsibility of a railway company in the case that the conductor of one of its trains might be guilty of negligence in the handling of the train, so that injury should be caused to any other employés working under his orders, without fault of the latter; nor by reason of the regulations will the negligence of the conductor result in showing the civil responsibility of the respective company, inasmuch as the civil or criminal responsibility which may be contracted by acts or omissions in cases of railway accidents, can only be reached at by a complete submission to the penal laws applied with due exactitude to the case in question.

I am not aware of any sentence in which article 83 of the said regulations has been interpreted, but in my opinion, the railway regulations has for its sole object the establishment of exact rules to which the companies must subject themselves in operation, and in

their relations with the Government, and for the violation of which they will be punished according to the dispositions contained in article 208, which states "All violations of this regulation which
52 companies may commit, will be punished by order of the government with a fine not exceeding $500, which will be imposed by the department of fomento (it is now the department of communications and public works), excepting always the right of private parties to indemniz-ation, and the responsibility which the company might have for the neglect or faults which they may have committed." The party interested in the final portion should, without doubt, take the necessary action before the proper tribunal, with submission to the laws which may be applicable.

I declare in reference to your question as to what is the meaning and interpretation of said article as given to it by the judges and lawyers generally of the Republic of Mexico, that I do not know what may be the signification or interpretation which may be given to that article by the courts and attorneys throughout the Republic in general; and as regards your question as to whether or not it is generally believed to have been the intention of congress in adopting said article to make the conductor in charge of a train the representative of the railroad company, I do not imagine that any one thinks that the idea of the federal executive in decreeing this regulation, was to constitute the conductor, in whose hands the train is while in operation, *as* the representative of the railway company in question, as this would entirely exceed the faculties of the executive. I refer to this authority, and not to that of congress, inasmuch as the regulation in question is not a law, and was not submitted, nor should be submitted to the approval of congress.

Article 184 of the Railway Rules, which says: "The companies are responsible for accidents which may occur through delays, neglect, abandonment or imprudence of employés," solely fixes the responsibility of the railway companies to the government for the application of art. 208 of said regulations, in order that the department of communications may impose the fine which the same authorizes, but in no way can be founded in said article the
53 responsibility of the companies for all injuries to all persons, including employés as well as other persons, for damages which may accrue to such person or persons on account of faults, tardiness, negligence, or imprudence, or want of capacity of their employés, as, if it treated of neglect or violations committed on the railways, the claimants would have the right to enter their claim before the proper judge in accordance with the laws, as is arranged in said article in the final portion. Regarding the portion of interrogatory which contains the following query: "Say if it is a fact or not that the courts and attorneys of the Mexican Republic in general consider that the railway companies are responsible with their employés for damages suffered in consequence of negligence or faults, etc." I would merely reply that that is my opinion, and I am unable to name occasions in which the judges have resolved affirmatively or negatively, nor can I refer to the opinions of other lawyers. Referring to the last portion of the interrogatory which

states as follows: "Say if it is a fact that it is a general opinion of judges and lawyers in the Mexican Republic that the fact that the party doing the damage is an employee or servant of the principal, does not prevent him from securing indemniz-ation for damages caused in consequence of the fault or negligence of his fellow-servant." I would reply in the same manner as in the previous paragraph.

Cross-examination:

In the judicial decision which I cited in replying to the third query formed by attorneys, Millard Patterson and C. N. Buckler, in the interrogatory which I have already answered, application was made of the decree of December 16", 1881, in regard to articles 326, 327, 330 and 331 of the Penal Code for the federal district, which holds effect throughout the Republic, for federal transgressions or for acts submitted to the federal courts, merely affirming in these decisions to the competency of the federal courts to handle the investigations which might arise from railway accidents which are mentioned in said judgments, and to confirm the suspensions
54 decreed by the district judges, without said investigations giving the right to demand civil responsibility, it having been clearly shown that neither the respective railway companies nor their employés, are responsible by reason of the said investigations. Having made this explanation, I can certify that in none of the judgments referred to was the question decided whether or not a transportation company may be held criminally liable under the laws of Mexico, or may be held civilly responsible for damages at the suit of one of its servants, who may have been injured by another servant while working together in the same line of service and to a common end and purpose, where such transportation company does not order done the act or omission which causes the injury, and where such company was not able to prevent such injury. The railway company cannot be held criminally responsible for the acts of their employés, in which they had no connection direct or indirect, but as regards the civil responsibility proceeding from these acts, the company can be declared responsible, in entire accord with articles 326, 327, 330, 331, paragraph II, 337 and 334, paragraph I, III, and IV, of the Penal Code before the proper federal courts, or with the relative local laws, before the competent State courts, said articles or local laws being interpreted in accordance with the different circumstances of each case.

I do not know whether or not any case has ever been decided by the courts of the Republic of Mexico wherein a claim was brought against a railroad company for injury sustained through fault or negligence of a fellow-servant of the claimant.

In my opinion, in order that the civil responsibility may fall on the railway companies, it is sufficient that the requisites which the articles call for, or which are referred to in the second answer, concur, which clearly fix the cases when the companies are civilly responsible for the acts or omissions of its employés.

Article 333 names the cases in which fathers, guardians, administrators, masters and directors of schools and factories, are
55 free from civil responsibility, but as regards the same responsibility contracted by the railway companies, in accordance with paragraph II of article 331, article ≠ 337 is applicable, which refers to paragraphs I, III, and IV of article 334 of the said Penal Code, which stipulates the cases when this civil responsibility is not contracted.

In accordance with articles 4, 5, 6, 11, 326, 330, 331 and 334 of the Mexican Code, it suffices that the intentional neglect or fault is committed by a subordinate employé on a railway, under the conditions given in those articles, for the respective company to contract civil responsibility, even though the employé is pardoned or freed from blame, unless the company is covered by one of the cases of exemption, it being absolutely indispensable that the intentional violation or fault is shown.

In my opinion, remembering the dispositions of the penal code to which reference has been made, it is not necessary that the railway company be declared responsible for a violation of the penal law, for the acts or omissions causing the damage, for said company to be civilly responsible, as it is sufficient for this that these acts or omissions included in some of the articles 4, 5, 6, and 11 of the Penal Code may be applicable to some of the employés, and that the requisites are followed contained in article- 326, 327, 330, 331, paragraph II, 337, and 334, paragraph- I, III and IV of the said code, but when the case occurs, as indicated in the last portion of the question "the acts or omissions which caused the damage may not have been authorized nor ordered by the company, but on the contrary were done in disobedience of orders, etc." In such case there is possibly no responsibility on the part of the railway company, taking into consideration article 330, applicable according to article 331, to the railway companies, because it might be considered that the acts or omissions which caused the damage did not take place in the service in which the causers were employed, but this estimation of case could only be arrived at from the facts as proven.

If it is proven without a doubt, in the case treated of, the
56 civil responsibility of an employé to his fellow-servant to whom he caused damages through the violation of his duty as required of him by the company; as regards the railway company, the civil responsibility can only rest on them through this fact, in the requisites called for in the said articles of the Penal Code are filled, the observations previously made being taken into consideration.

If referring to railway accidents article 333 of the Penal Code might have application, doubtless the dispositions in the second case in ≠ 326 would not be sufficient to make the company responsible in the case where the injury was caused by an employé of the company, and the acts or omissions that caused the injury were not authorized or directed by the company, but were against its orders and in violation of the duty that such employé owed to the company by his contract of employment either express or implied, where

the company was not in a position to prevent such acts or omissions, and had taken proper precaution by its rules and regulations to avoid the injury, if proven that in the acts or omissions from which the responsibility arises, the company was not at fault, nor could have prevented it; but, as in my humble opinion, that article has no application to the accidents or misfortunes which take place on railways, the companies are only exempt from civil responsibility for the acts or omissions of their employés executed while in service for which they are destined, as disposed in article 330, "when it is shown that the damage arises from unfor-seen circumstances or without any fault on their part, or on the part of their employés or servants, caused by force or other power which they could not resist," as is established in paragraph 1 of article 334, applied to article 337.

Article 33 of the Penal Code established that the principal shall not be responsible for the actions of his subordinates when it shall prove that it was not personally at fault nor was in a position to prevent the act or omission which gave rise to the liability or claim,

and as regards the second portion of your question, viz:

57 "Are not railway companies, though not specifically mentioned in articles 333 and 334, nevertheless within the rules of said articles, and are not said articles nevertheless applicable to them under paragraph 11 of article 331 of the code?" I believe that the railway companies, in no case, are included in said article, and that they are expressly included in the paragraphs I, III, and IV of article 334 of the said code, in which reference is made to = 331, paragraph II, and if article 337 in its first paragraph states "the dispositions contained in paragraphs I, III, and IV of article 334 and that which precedes is applicable to the transportation companies of which fraction II of article 331 speaks," the words "which precedes" I consider refers to 336 and not to 333, which precedes 334.

In answer to the eleventh cross-interrogatory, which is as follows: "Is it not true that transportation or railroad companies can only be held liable for injuries caused by their agents or employés when the following conditions concur: 1st. That the injury shall have been caused by the agent or employé in the performance of his duties. 2d. That the injury shall have been caused either through an act or omission of the company, or of its orders, or by the act or omission of an agent of the company, which act or omission of an agent the company was in a position to prevent; in other words, the act or omission of the employé which may have caused the injury must either be the result of the company's instructions or rules, or if not so, the company must have been in a position to prevent the injury;" I will state: As regards the first paragraph of the interrogatory, my opinion is that attention should be given to the article 330 of the Penal Code which states "so that, in accordance with articles 326 and 327, the employe-s may be responsible for their employés and servants, it is a necessary condition that the acts or omissions of the latter which give rise to the responsibility shall take place in the service in which they are employed," which disposition

has application to the railway companies, in accordance with
58 paragraph II of article 331. Regarding the second paragraph of the interrogatory I would merely state, that in accordance with what is mentioned in previous replies, the civil responsibility of the railway companies can only be demanded when from the proven facts it is shown that articles 326, 327, 330, paragraph II of 331, and paragraphs I, III and IV of art. 334, are precisely applicable, as is established in article 337 of the Penal Code, without it being possible to make a general observation, as regards the application to be made of these articles, inasmuch as in each case the judge will decide whether or not to demand the civil responsibility of the railway companies for the acts or omissions of their employés, which may have caused the investigations, as shown in the proceedings.

The following provisions taken from the laws of the Republic of Mexico, and claimed to be applicable to this case, were proven and offered in evidence, to wit:

From the federal constitution of the Mexican United States:

Art. 72. Congress has power * * * XXII. To enact laws governing the general lines of communication, and governing post-offices and mails.

Art. 97. The federal courts have jurisdiction: 1. Of all questions growing out of the execution and application of the federal laws, except when the application of the law only effects interests of individuals, in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code:

Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes and crimes resulting from neglect.

Art. 11. Negligent crimes exist—I. Where an act is done or a duty
59 omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * III. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved: if the accused is ignorant of such circumstances, through not having previously made the investigations which the duty of his profession or the importance of the case demands.

Same code, Book Second: Civil liability in criminal matters:

Art. 301. The civil liability arising from an act or omission con-

trary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemni-zation, and (4) payment of judicial expenses.

Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, with the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemni-zation imports: The payment of damages; that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

60 Art. 306. The condition required by the two preceding articles that the damages and injuries should be actual, shall not prevent that the indemni-zation of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend: on other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

Art. 310. The right of civil responsibility forms part of the estate of a decedent and descends to his heirs and successors,—provided it be not the case of the following article, or that it arise from injury or defamation and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

Art. 311. The act to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 316, as directly damaged. Consequently, such action forms no part of the estate of the deceased, nor is it extinguished although the latter pardon the offense in life.

61 Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and

terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed.

Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or of a cause which is the immediate effect of such blows or wounds.

Art. 322. In the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

Art. 325. The provisions of the foregoing articles for com-
62 puting the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven: that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability, shall occur in the service for which they were employed.

Art. 331. Under the condition of the preceding article those liable are * * * railroad companies.

Art. 363. (Limitation.) The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code, according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution but for reparation of damages, of indemnity for injuries, or
63 for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory law. Penal Code:

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * V. Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceedings in the former shall be stayed.

From the Federal Civil Code:

Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged.

Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

Art. 21. In case of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties.

Art. 1095. Limitation bars in three years: * * * VIII. Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals,
64 and which the law imposes upon the representatives of such persons or the owners of the animals.

Act of Congress of Dec. 16th, 1881.

Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed upon Mexican territory, according to the following bases:

I. Railroads, telegraphs, and telephones which, in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch at any point in the territorial boundary line of the Republic and foreign countries or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction XXII of art. 72 of the constitution.

II. These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved:

G. Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines.

H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation.

From the regulations for the construction, maintenance and operation of railroads:

Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

Art. 83. The conductor of a train en route is the person in
65 command of all the train crew, including the engineer and fireman.

Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward.

Art. 124. Companies (railroad) are liable for accidents which occur through the failure to observe the provisions of this chapter (chap. 7) respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals.

Art. 184. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employés.

Art. 298. All violations of this law, which companies (railway) commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals,

through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them.

It was admitted on the trial that J. W. Eckman was the appointed guardian of Husselman, appointed by the county court of El Paso county, Texas, and that he, Eckman, was, at the time of the institution and trial of this case, a resident and citizen of El Paso county, Texas, and the western district of Texas.

That under said proof the court instructed the jury to find a verdict for the plaintiff herein, to which charge of the court the defendant then and there in open court excepted for the reason:

First. That the court had no jurisdiction to determine this cause under the laws of Mexico, it being provided thereby that the plaintiff, in order to recover, would have to show that defendant
66 committed some crime under the laws of said Republic, and this court, in attempting to try this case under said laws and instructing to find for plaintiff, thereby caused to be enforced the penal laws of said Republic.

Second. For the reason that the court, under said laws, had no jurisdiction or right to award plaintiff a recovery and instruct the jury to find for plaintiff before first endeavoring to effect a compromise between the parties, as provided by article 313 thereof.

Third. The court had no jurisdiction or authority to instruct the jury to find for the plaintiff in said cause, for the reason that the evidence showed that plaintiff's cause of action arose in the Republic of Mexico, where defendant had its railroad business and all its cars and property, and that the actual plaintiff herein was a resident and citizen of the State of Illinois, and not of this State, and that the defendant herein is a resident of and citizen of the State of Massachusetts, and not of this State.

The defendant now here tenders this its bill of exceptions, praying that the same be allowed, signed and sealed by the court, and made a part of the record herein, which is accordingly done this 15th day of April, A. D. 1901.

T. S. MAXEY,
Judge U. S. Circuit Court, Western District of Texas.

O K.—
P. & B.

(Indorsement:) 261. J. W. Eckman, guardian of Alfonso Husselman, *vs.* The Mexican Central Railway Company, Limited. Def'd't's 5th bill of exceptions. Filed this 15th day of Ap'l, 1901. D. H. Hart, clerk. By. J. P. Hodgson, deputy.

67 *Defendant's Bill of Exceptions No. 6.*

Filed May 9th, 1901.

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, April Term, A. D. 1901.

J. W. ECKMAN, Guardian of Alfonso Huesselmann, Plaintiff,
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, Defendant. } No. 261.

Be it remembered that upon the trial of the above styled and numbered cause in said court on the 4th day of April, 1901, the following testimony was offered in evidence, the same being all the testimony that was offered upon the trial of said cause, to wit:

ALFONSO HUESSELMANN, plaintiff, testified in his own behalf as follows:

"My name is Alfonso Huesselmann. I was employed by The Mexican Central Railway Company, the defendant in this case, in the capacity as brakeman on a freight train. I was injured while engaged in the service of the defendant at a place called La Labor. The conductor ordered me to cut in the air on some *some* cars about the middle of the train. As I went up and stepped in between the cars and was in the act of cutting in the air-coupling cars—as I started to stand up the train came back and caught my leg. Two wheels ran over the leg, and as the second wheel passed over I drew my leg off the track and grabbed at the first brake beam: I made a grab at that and missed it, and made a grab at the second and missed it, and grabbed at the third and hung fast to that until the train stopped. I was drug along about a car and a half, and the train ran about three car-lengths. The conductor's name was Griffin. He ordered me to go in the train and couple the air. By coupling the air I mean this: There is a hose runs under every car, and there is a coupling at the end of the hose to couple up and to run air from one car through to another. Those hose are coupled up across the track;
68 one being on one side and one on the other side, extending across underneath. In pursuance to the order, I had gone in there and had just made a coupling when the train started. I did not know the train was going to start; had received no notice of an intention on the part of the conductor to start the train. It was necessary for me to go in between the cars in order to couple the cars, as there was no other way to do it; it was right in the center of the cars. I was eighteen years old at the time this accident happened. When the cars passed over my leg they crushed it, mashed it. It was amputated about the 9th or 10th of February; I was hurt the 6th of February. They put me on the train and we laid over at San Luis Potosi from 10 o'clock that night until 7 the next

morning. Never sent the doctor around to see me; got into Aguas Calientes where the hospital is, about one o'clock the next day. When I arrived at the hospital one of the assistant surgeons told me he would have to take the leg off. I was two days at the division. My leg was amputated after I got to the hospital. The bone began to rot after the first amputation and they had to work at it again. I was in the hospital six months, and after I left the hospital my leg got worse again, and I was in the city about three months and then went back to the hospital again. That was about eight or nine months altogether that I was in the hospital. The train was on the main line at the time the conductor ordered me to go in and cut the air on those cars. The train had come from Tampico. I could not tell exactly where this train stopped on the main line; we fixed up those chains; took up slack out of chain; and we uncoupled the car behind and after taking the slack out of the chain we coupled the cars again. There were three engines attached to the train at that time; two in front and one behind. There were two brakemen besides myself, two conductors, three engineers and three firemen. There was something like 12 or 13 cars, might have been 14. Mr. Griffin, the conductor, had control and management of all those engines, employés and cars at the time I was hurt. I am not now able to pursue the duties of a brakeman on a train. I lost a good deal of time, probably nine months; I was in the hospital
69 laid up nine months. I was earning between $60.00 and $75.00 a month Mexican money."

Cross-examination:

"I do not remember the names of all the engineers, but there was one by the name of Glass. We had three engines, one in rear and two in front. There was a man by the name of Howard, but I am not positive whether Howard was another on of the engineers or not. There were three engines attached to the train. There were 12 or 13 cars in the train, and we had three engines on account of the heavy grade between —— and ——. It was customary to have three engines. There were two brakemen besides myself with the train; three altogether. I was head brakeman. This car was in about the middle of the train. I was sent by the conductor to couple up; ordered by the conductor to do so, and it was my duty to obey orders. The other brakemen at that time were pretty close around there; I believe one was on the left-hand side of the train and one on the right-hand side about two or three car-lengths from me when I was hurt; toward the rear I think. I believe the other one was on the other side of the train. I am not positive. I do not know where he was standing. There was a grade at that place. We were standing on the main track; the grade was pretty heavy. The conductor at that time was at the rear of the train; I do not know exactly where he was, but I believe back by the switch; I believe he throwed the switch for the train to back up on to the switch; the switch was about ten car-lengths from me, I guess. The train backed toward the switch when I was hurt. The grade is down toward the switch. I do not know who

gave the signal for the train to start; I was busy coupling at the time. As I left the conductor, I walked about five car-lengths after the conductor told me to cut in the air on the cars, and I had my back toward the conductor in walking up there. I do not know whether any one gave a signal for the engineer to back the train or whether he backed the train without a signal.

70 I am pretty sure the train moved with steam, because they moved three car-lengths. I believe there were a couple of hand brakes set when I went in to couple the air. The brakes were off in the back, I think. The cars being uncoupled, all the brakes except hand brakes that might be set, would not necessarily be off; I believe they were working air from both ends. This air pipe being uncoupled in the middle of the train would not effect the air if the cocks were turned off. I don't know whether any brakes were on the train at that time. I do not know whether the engine whistled or rung a bell while I was in there. The train would not have moved three car-lengths of its own weight down the grade toward the switch. It would have moved until stopped, after starting; I never saw a train that run from itself run so far as that; they usually stop them. This train started up too quick to move from its own weight; a train starting from its own weight would start off slow. I did not hear any steam nor hear any bell rung; as a general rule they blow a whistle or ring a bell, but I did not hear anything. If they had blown a whistle or rung a bell I would have heard it and that would have been notice to me that the train was going to start and to come out of there. I am quite positive they did not blow any whistle. I could not hear steam at that distance; I could hear exhaust. I do not know whether the conductor gave a signal or not. It must have been started by the enginemen; I do not know whether any signal was given or not. There was steam used in starting the cars because they started too quick to have run off of their own accord."

Redirect examination:

"I have before met the witness by the name of Scheh who has given a deposition; he was there at the time; he was on the rear engine."

Recross-examination:

"I was 18 at the time the accident occurred, and that was February 6th, 1899. My parents reside in Chicago, Illinois; have a
71 father and mother living there. They never lived in El Paso, Texas, or in Texas at all."

L. Ph. Scheh, testified by deposition taken and read in evidence by plaintiff as follows:

"My name is L. Ph. Scheh, my age 25 years, and I reside in Caldwell county, Texas. I am acquainted with Alfonso Huesselmann, and I worked with him in Mexico, on the Mexican Central Railway Company, Limited. I knew of his work-

ing for said company, in the Republic of Mexico, in the capacity of brakeman on one of their freight trains, under Conductor Griffin, and of his being injured while so in the employ of said company. He was injured by having as many as two cars, as I now remember it, passing over his foot and cutting it off so that it only hung by the skin; we had pulled into a way station and was trying to get onto a switch for the passenger train to pass. The train was very heavy and hard to control, and the air on the air brakes had become disconnected somewhere about the middle of the train. The conductor ordered Huesselmann to go in and connect the air. He at first objected, when the conductor became angry and said to him "You damn Dutchman go in there and fix that;" before he got it fixed the conductor signalled the train to move, it did move, and while Huesselmann was trying to get from between the cars one of the wheels caught his foot and cut it off as I have stated. He was trying to couple the air at the time he was injured; while he was so engaged the conductor gave the signal to the engineer by movements of his hands to move the train. He did move it and Huesselmann was caught before he could get from between the cars. I do know of my own knowledge that the signal to move the train was given. The conductor was on the opposite side of the train from where I usually sat on the engine. I was attracted by hearing him cursing and talking in a loud and angry voice. I moved over onto that side of the engine, and saw the conductor standing there about ten yards from the train. I plainly saw him,
after the boy had gone in between the cars to couple the air,
72 give the signal to the engineer to move the train, and at
the same time he gave the signal he hollowed to the engineer "to back up." The engineer moved the train instantly and the boy was caught as I have stated. I saw the person giving the signal to the engineer to move the train; he was at the time in the employ of the Mexican Central Railway Company, Limited, in the capacity of a conductor, and at the time he gave the signals was acting in that capacity and had charge of that train, and he gave the signal to the engineer as conductor. As I have stated, the conductor gave the signals to move the train to the engineer, and the engineer at once obeyed the signal and moved the train. The name of the conductor in charge was Griffin, the name of one of the engineers was Tom Glass. We had two engines on that train, and the regular engineer on my engine was not on duty that day, and I do not remember the name of the engineer who was on duty that day controlling my engine. Griffin was the conductor at the time of the injury; he ordered said Huesselmann in between the cars to couple the air. He (Griffin) gave the engineers the signal to back said train; the engineers saw said signal and obeyed it. They moved said train suddenly while the said Huesselmann was in between the said cars for the purpose of coupling the air. Huesselmann was hurt by the wheels of the car passing over his foot.

There were two engines attached to the train at the time of the injury, commonly called double-headers. There were seven em-

ployés that I now remember with said train, two engineers, two firemen, two brakemen and one conductor. The conductor Griffin was in charge of the whole business at the time of the injury. No person present then had any authority or control over the conductor. A little while afterwards the passenger train came in, and there was on board the road superintendent and the traveling doctor of the company. I do not know whether these parties had any control over the conductor or not. The doctor looked at the boy, but gave him no assistance; he only shook his head, said "Too bad," and went back to his train, which at once pulled out. I myself requested the doctor to take
73 the boy on the train with them to Tampico, which they could have reached some time that evening; he made no reply whatever to my request. We then tried to get Griffin, as the man in authority of the train, to take him in, but he refused to do so, saying that he would be fired as soon as he got in. We then refused to do anything until the boy was carried to Cardenas. They then took one engine (mine) and caboose, and we carried him into Cardenas, reaching there about two or three o'clock the same day. The conductor has full control and controls the employés, and directs the movements of the engines and cars. It is the duty of the entire crew to obey the orders of the conductor. The conductor gives the signals to the engineer for the movement of the train, and directs all of the employés as to what work they are to do with reference to the running of said train. The train moves when he says for it to move, and stops when he says for it to stop. And the crew do such work in connection with the train as the conductor directs them to do.

Cross-examination:

I was not discharged by the defendant. I quit when I went in from this trip, for the reason that the firemen were ordered by the foreman to clean the engines; and every white fireman quit work.

LIC. ANDRES HORCASITAS, testified by deposition taken and read in evidence by plaintiff as follows:

"My name is Andres Horcasitas, married, forty-eight years of age, occupation lawyer, and at present judge of the supreme court of justice of the nation, resident of the city of Mexico and living at # 10 Calle de las Artes. For the last twenty-three years have been an officer of the administration of justice of the federation, having filled for one year the post of secretary to the circuit court then existing in Mazatlan, State of Sinaloa, for six years the same position in the circuit court of this city, from which post I was promoted to that of judge of *of* the same court, and there remained twelve years, being subsequently promoted to the supreme court of justice of
74 the nation with the character of supernum-ary judge, which office I have filled for four years. During the twelve years that I was circuit judge in this capital, I pronounced a large num-

ber of sentences in which I applied the provisions of the decree of the 16" of December, 1881, in connection with articles 326, 327, 330, 331 of the Penal Code of the Federal district, which is in force all over the Republic as regards offenses against the federation or acts which are submitted to the cognizance of the federal tribunals. In these final sentences, which I pronounced in revision and as court of second instance of the sentences of the district judges who were under my jurisdiction, I declared: That under the decree of the 16" of December, 1881, the federal courts were competent to take cognizance of the investigations required by railroad accidents, whenever such accidents affected the security or integrity of the works or the service of the railroads, and that such competency extended to inquiries into the responsibility that might fall on the respective companies through such accidents, whether caused directly by the companies or through some of their employés, and this responsibility was enforced in accordance with articles 326, 327, 330 and 331 of the Penal Code of the Federal district, which is in force throughout the Republic, as regards facts such as those in question, and that come under the jurisdiction of the federal courts. I could cite a great number of final sentences of the same tenor, but I consider it sufficient to refer to some of them, confining myself to giving their date and the periodical "Semanario Judicial de la Federacion" (Weekly Report of Judicial Proceedings) in which there was published, and therefore presents them in the following form: Feb'y 25", 1885, 2" period, volume 8, pages 197 to 198; Feb'y 27", 1886, volume 10, pages 420 to 430; April 29", 1886, same volume, pages 599 to 602; May 27", 1886, same volume, pages 696 to 700; June 11", 1886, same volume, pages 848 to 852; October 27", 1886, volume 11, pages 334 to 337; March 24," 1887, volume 12, pages 215 to 217; November 9", 1887, volume 13, pages 517 to 520; March 1", 1888, volume 14, pages 393 to 397; April 9", 1888, same volume, pages
75 627 to 631; April 9", 1888, same volume, pages 637 to 645; June 18", 1888, same volume, pages 1006 to 1018; July 21", 1888, volume 15, pages 33 to 35; July 21", 1888, same volume, pages 36 to 40; July 26", 1888, same volume, pages 41 to 44. Two others of the same date on pages 45 to 47, and 48 to 51, and July 30", 1888, same volume, pages 52 to 57; August 1", 1888, same volume, pages 154 to 159. In all these sentences the prosecution for railroad accidents was dismissed, and if the civil liability referred to in articles 326, 327, 330 and 331 of the Civil Code of the Federal district in connection with the decree of the 16" December, 1881, was not enforced, it was because, as shown in the course of the investigations, neither the railroad company nor their employés were in any way responsible for the events that gave rise to those investigations. It would not be out of place here to make mention of the sentence pronounced on the 10th January, 1889, and published in volume 16 of the Semanario Judicial, second period, pages 20 to 26, in which there is a clear exposition of the cases which come within the jurisdiction of the federal courts, and those that come within that of the ordinary courts, according to the provisions of the decree of the 16" Decem-

ber, 1881, when relating to railroad accidents; and also the final sentences pronounced on the 25" of July, 1891, which clearly shows the reasons for the dismissal of the case, as ordered by the district judges in these investigations, and which having been confirmed by the respective superior courts, which in this case was the circuit court of this capital, closed the door against all farther proceedings against the railroad companies and their respective employés. The reading of these sentences clearly shows the liability under which these railroad companies are as regards the accidents that may occur in the operation of their roads through any fault or negligence on the part of their employés in the service of the roads, and which liability is to be enforced by the circuit judges in the first instance, and by the respective circuit courts in the second instance, according to the jurisdiction within which
76 the accident has taken place. This competency is founded on paragraphs "H" and "I" of section 2 or article 1" of the decree of 16" December, 1881, in which section 2, we find a detailed statement of all the railroad accidents that come within the jurisdiction of the local courts, and which accidents are those that occur on the railroads that do not connect to municipalities in the federal district and territories, that do not cross the boundaries of the different States of the federation, or that do not touch any port or boundary line of the Republic with a foreign country, and that do not run parallel within a zone of twenty leagues. Those cases which come under federal jurisdiction are subject to the provisions of the penal code of the federal district, and when they come under local jurisdiction they are subject to the penal legislation that is in force in the State in question, it being noted that almost all the States have adopted the penal code of the federal district. If the investigation shows that any employé of the railroad on which the accident has taken place is responsible for it, the corresponding penalty is imposed upon him, and it is then that the respective companies can be held civilly liable with articles 326, 327, 330 and 331 of the Civil Code, bearing in mind the provisions of article 337 of the same code. The jurisprudence laid down in the sentences above mentioned has been sanctioned by the supreme court of justice of the nation in the revision of the proceedings with respect to which those sentences were pronounced, seeing that it explicitly declared in each case that no responsibility had been incurred through the proceedings taken in the investigations in question. Although the foregoing would be sufficient to show the approval that the supreme court of justice has given the interpretation of the decree of 16" December, 1881, it is not out of place to mention a sentence pronounced within the last few days by the supreme court of justice in the suit of "amparo." (Amparo is the protection that is granted by the federal courts to any individual in whose person or interests the con-
77 stitutional guarantees are claimed to have been violated. It must be confirmed by the supreme court.) This suit was entered in the second district court of this city by Leandro Herrera against the sentence pronounced on the 5" of October, 1889, by the first minor court. In this sentence, which was pronounced

on the 14" of January of this year, protection is granted to the claimant on the following judicial considerations: "That the sentence complained of being principally founded on the fact that Herrera did not prove the ownership of the coach, which was damaged by the box car, it is to be observed that outside of the records of the civil suit which he instituted, there is a receipt for the amount of five hundred dollars ($500.00) which he paid for a Troakar coupé, and those of the cabinet-maker and carpenter for repairs to the coach # 34, and that for the purpose of articles 304 and 305 of the Penal Code, which relate to the owner and to the injured party, it is only necessary to prove the possession of the article which gives rise to the claim, and as the investigation does not require the plaintiff to prove whether or not he was the owner of that article, but only whether the person who caused the damage did or did not render himself liable under article- 327, 326 and 330, section two of the Penal Code, for which reason in taking cognizance of the question of ownership the minor judge clearly infringed article 605 of the Civil Code proceedings, which provides that "the sentence will exclusively refer to the rights claimed, and the exceptions taken in the complaint and answer," thus violating the guarantees set forth in article 14 of the constitution. That the complain having unquestionably proved his rights as the possessor of public hack # 34 to claim loss and damage against the District Railroad Company for an accident caused through one of its employees, there is no reason in the opinion expressed by the first minor judge when he says in his sentence that there is no evidence on which to find a decision in favor of a railroad, because it having been proved in this case that the conditions of article 326 were fulfilled
78 there can be no question but what the liability of the company under the provisions of article 327 in not declaring so, that said first minor judge clearly neglected to give the proper construction of article- 330 and 331, section 2, of the Penal Code, with which he also infringed the guarantees granted in the above-mentioned article 14 of the constitution." As can be seen, the supreme court of justice of the nation has declared that article- 326, 327, 330 and 331 of the Penal Code are exactly applicable to enforce the civil liability which is incurred by a railroad company through any accident that takes place in the operation of its lines.

In answer to question as to whether or not, under the laws of Mexico, where two men are employed by the same employer or by the same railroad and are engaged in the same common service, and, through the negligence or carelessness of one of the men so employed, the other receives an injury without any fault upon his part, the courts of the Republic of Mexico hold the master or the railroad company liable for such injury, I will state, that although it would not be easy to designate any sentence in which such a case has been decided, I certainly can assert that according to the articles of the penal code before mentioned, the liability of the railroad company for compensation for loss and damage caused by the negligence of its employés is clearly shown, whether the injured party is a stranger to the company or whether he bears the character of an

employé of the same company, as a philosophical study of the law will at once show that the liability of the company cannot be altered by the character of the injured party, unless in the case where he himself is the person to be held liable.

In my opinion there can be no doubt that articles 326, 327, 330 and 331, and others of the same character in the penal code of the federal district, establish the civil liability of the railroad companies for the personal injuries that are caused through the negligence of one of their employés and suffered by another employé of the same company, and that the same rules are laid down in the
79 penal legislation of the State- of the federation, which, as already stated have almost all adopted the same penal code, whilst those which have enacted different penal laws do not make any provision on this point different to those of the federal district.

Although it is in the interrogatory stated that the law of December 16", 1881, article 53, establishes that "the conductor of a train in service is the head of all the employés handling the same, including the engineer and fireman," said law does not contain any such disposition, and it was doubtless intended to cite article 83 of the regulations of July 1", 1883, for the construction, maintenance and operation of railways, decreed by the federal executive, in exercise of its constitutional rights, and in conformity with article I of the said law; but this disposition, having for its sole object to determine who, in a train of operation, is the chief of the company employés on the said train, does not, by itself, nor in relation to article 184 of the said regulations, to which possibly the clauses in this interrogatory are intended to refer, inasmuch as # 194, which is cited, has no connection with the matter, touch the civil responsibility of a railway company in the case that the conductor of one of its trains might be guilty of negligence in the handling of the train so that injury should be caused to any other employé working under his orders, without fault of the latter; nor by reason of the regulations will the negligence of the conductor result in showing the civil responsibility of the respective company, inasmuch as the civil or criminal responsibility which may be contracted by acts or omissions in cases of railway accidents, can only be reached at by a complete submission to the penal laws applied with due exactitude to the case in question.

I am not aware of any sentence in which article 83 of the said regulations has been interpreted, but in my opinion, the railway regulations has for its sole object the establishment of exact rules to which the companies must subject themselves in operation, and in their relations with the Government, and for the violation of which they will be punished according to the dispositions contained in arti-
ticle 208, which states, "All violations of this regulation which
80 companies may commit, will be punished by order of the government with a fine not exceeding $500, which will be imposed by the department of fomento (it is now the department of communications and public works), excepting always the right of private parties to indemnization, and the responsibility which the company might have for the neglect or faults which they may have committed." The party interested in the final portion, should, with-

out doubt, take the necessary action before the proper tribunal, with submission to the laws which may be applicable.

I declare in reference to your question as to what is the meaning and interpretation of said article as given to it by the judges and lawyers generally of the Republic of Mexico, that I do not know what may be the signification or interpretation which may be given to that article by the courts and attorneys throughout the Republic in general; and, as regards your question as to whether or not it is generally believed to have been the intention of congress in adopting said article, to make the conductor in charge of a train the representative of the railroad company. I do not imagine that any one thinks that the idea of the federal executive in decreeing this regulation, was to constitute the conductor in whose hands the train is while in operation, *as* the representative of the railway company in question, as this would entirely exceed the faculties of the executive. I refer to this authority, and not to that of congress, inasmuch as the regulation in question is not a law, and was not submitted, nor should be submitted to the approval of congress.

Article 184 of the Railway Rules, which says: "The companies are responsible for accidents which may occur through delays, neglect, abandonment or imprudence of employés," solely fixes the responsibility of the railway companies to the government for the application of art. 208 of said regulations, in order that the department of communications may impose the fine which the same authorizes, but in no way can be founded in said article the responsibility of the companies for all injuries to all persons, including
81 employés as well as other persons, for damages which may accrue to such person or persons on account of faults, tardiness, negligence, or imprudence, or want of capacity of their employés, as, if it treated of violations or neglect committed on the railways, the claimants would have the right to enter their claim before the proper judge in accordance with the laws, as is arranged in said article in the final portion. Regarding the portion of the interrogatory which contains the following query: "Say if it is a fact or not that the courts and attorneys of the *Republic of the* Mexican Republic in general consider that the railway companies are responsible with their employés for damages suffered in consequence of negligence or faults, etc." I would merely reply that that is my opinion, and I am unable to name occasions in which the judges have resolved affirmatively or negatively, nor can I refer to the opinions of other lawyers. Referring to the last part of the interrogatory which states as follows: "Say if it is a fact that it is a general opinion of judges and lawyers in the Mexican Republic that the fact that the party doing the damage is an employé or servant of the principal, does not prevent him from securing indemnization for damages caused in consequence of the fault or negligence of his fellow-servant," I would reply in the same manner as in the previous paragraph.

Cross-examination:

"In the judicial decision which I cited in replying to the third query formed by attorneys, Millard Patterson and C. N. Buckler, in the interrogatory which I have already answered, application was made of the decree of December 16", 1881, in regard to articles 326, 327, 330 and 331 of the Penal Code for the federal district, which holds effect throughout the Republic, for federal transgressions or for acts submitted to the federal courts, merely affirming in these decisions to the competency of the federal courts to handle the investigations which might arise from railway accidents which are mentioned in said judgments, and to confirm the suspensions
82 decreed by the district judges, without said investigations giving the right to demand civil responsibility, it having been clearly shown that neither the respective railway companies nor their employés, are responsible by reason of the said investigations. Having made this explanation, I can certify that in none of the judgments referred to was the question decided whether or not a transportation company may be held criminally liable under the laws of Mexico, or may be held civilly responsible for damages at the suit of one of its servants, who may have been injured by another servant while working together in the same line of service and to a common end and purpose, where such transportation company does not order done the act or omission which causes the injury, and where such company was not able to prevent such injury.

The railway company cannot be held criminally responsible for the acts of their employés, in which they had no connection direct or indirect, but as regards the civil responsibility proceeding from these acts, the company can be declared responsible, in entire accord — articles 326, 327, 330, 331, paragraph II, 337 and 334, paragraph I, III, and IV, of the Penal Code before the proper federal courts, or with the relative local laws, before the competent State courts, said articles or local laws being interpreted in accordance with the different circumstances of each case.

I do not know whether or not any case has ever been decided by the courts of the Republic of Mexico wherein a claim was brought against a railroad company for injury sustained through fault or negligence of a fellow-servant of the claimant.

In my opinion, in order that the civil responsibility may fall on the railway companies, it is sufficient that the requisites which the articles call for, or which are referred to in the second answer, concur, which clearly fix the cases when the companies are civilly responsible for the acts or omissions of its employés.

Article 333 names the cases in which fathers, guardians, administrators, masters and directors of schools, and factories, are
83 free from civil responsibility, but as regards the same responsibility contracted by the railway companies, in accordance with paragraph II of article 331, article 333 is applicable, which refers to paragraphs I, III, and IV of article 334 of the said Penal Code, which stipulates the cases when this civil responsibility is not contracted.

In accordance with articles 4, 5, 6, 11, 326, 330, 331 and 334 of the Mexican Code, it suffices that the intentional neglect or fault is committed by a subordinate employé on a railway, under the conditions given in these articles, for the respective company to contract civil responsibility, even though the employé is pardoned or freed from blame, unless the company is covered by one of the cases of exemption, it being absolutely indispensable that the intentional violation or fault is shown.

In my opinion, remembering the dispositions of the penal code to which reference has been made, it is not necessary that the railway company be declared responsible for a violation of the penal law for acts or omissions causing the damage, for said company to be civilly responsible, as it is sufficient for this that these acts or omissions, included in some of the articles 4, 5, 6, and II of the Penal Code may be applicable to some of the employés, and that the requisites are followed contained in article- 326, 327, 330, 331, paragraph II, 337, and 334, paragraphs I, III and IV of the said code, but when the case occurs, as indicated in the last portion of the question "the acts or omissions which caused the damage may not have been authorized nor ordered by the company, but on the contrary, were done in disobedience of orders, etc." In such case there is possibly no responsibility on the part of the railway company, taking into consideration article 330, applicable according — article 331, to the railway companies, because it might be considered that the acts or omissions which caused the damage did not take place in the service in which the causers were employed, but this estimation of case could only be arrived at from the facts as proven.

84 If it is proven without a doubt in the case treated of, the civil responsibility of an employé to his fellow-servant to whom he caused damages through the violation of his duty as required of him by the company; as regards the railway company, the civil responsibility can only rest on them through this fact, if the requisites called for in said articles of the Penal Code are filled, the observations previously made being taken into consideration.

If referring to railway accidents article 333 of the Penal Code might have application, doubtless the dispositions in the second case in ≠ 326 would not be sufficient to make the company responsible in the case where an injury was caused by an employé of the company, and the acts or omissions that caused the injury were not authorized or directed by the company, but were against its orders and in violation of the duty that such employé owed to the company by his contract of employment either express or implied, where the company was not in a position to prevent such acts or omissions, and had taken proper precautions by its rules and regulations to avoid the injury, if proven that in the acts or omissions from which the responsibility arises, the company was not at fault, nor could have prevented it; but as, in my humble opinion, that article has no application to the accidents or misfortunes which take place on railways, the companies are only exempt from civil responsibility for the acts or omissions of their employés executed while in service

for which they are destined, as disposed in article 330, "when it is shown that the damage arises from unfor-seen circumstances or without any fault on their part, or on the part of their employés or servants, caused by force or other power which they could not resist," as is established in paragraph I of article 334, applied to article 337.

Article 33 of the Penal Code established that the principal shall not be responsible for the actions of his subordinates when it shall be proved that it was not personally at fault nor was in a position to prevent the act or omission which gave rise to the liability or
85 claim, and as regards the second portion of your question, viz: "Are not railway companies, though not specifically mentioned in articles 333 and 334, nevertheless within the rules of said articles, and are not said articles nevertheless applicable to them under paragraph 11 of article, 331 of the code?" I believe that the railway companies, in no case, are included in said article, and that they expressly are included in paragraphs I, III, and IV of article 334 of the said code, in which reference is made to # 331, paragraph II, and if article 337 in its first paragraph states "the dispositions contained in paragraphs I, III, and IV of article 334 and that which precedes is applicable to the transportation companies of which fraction II of article 331 speaks," the words "which precedes" I consider refers to 336 and not to 333, which precedes 334.

In answer to eleventh cross-interrogatory, which is as follows: "Is it not true that transportation or railroad companies can only be held liable for injuries caused by their agents or employés when the following conditions concur: 1st. That the injury shall have been caused by the agent or employé in the performance of his duties. 2d. That the injury shall have been caused either through an act or omission of the company, or of its orders, or by the act or omission of an agent of the company, which act or omission of an agent the company was in a position to prevent; in other words, the act or omission of the employé which may have caused the injury must either be the result of the company's instructions or rules, or if not so, the company must have been in a position to prevent the injury;" I will state: As regards the first paragraph of the interrogatory, my opinion is that attention should be given to the article 330 of the Penal Code which states "so that, in accordance with articles 326 and 327, the employe-s may be responsible for their employés and servants, it is a necessary condition that the acts or omissions of the latter which give rise to the responsibility shall
86 take place in the service in which they are employed," which disposition has application to the railway companies, in accordance with paragraph II of article 331. Regarding the second paragraph of the interrogatory I would merely state, that in accordance with what is mentioned in previous replies, the civil responsibility of the railway companies can only be demanded when from the proven facts it is shown that articles 326, 327, 330, paragraph II of 331 and paragraphs I, III and IV of art. 334, are precisely applicable, as is established in article 337 of the Penal Code, without it being possible to make a general observation, inasmuch as

in each case, the judge will decide whether or not to demand the civil responsibility of the railway companies for the acts or omissions of their employés, which may have caused the investigations, as shown in the proceedings.

The following provisions taken from the laws of the Republic of Mexico, and claimed to be applicable to this case, were proven and read in evidence, to wit:

From the federal constitution of the Mexican United States:

Art. 72. Congress has power * * * XXII. To enact laws governing the general lines of communication and governing post-office- and mails.

Art. 97. The federal courts have jurisdiction: 1. Of all questions growing out of the execution and application of the federal laws, except when the application of the law only effects interests of individuals, in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code:

Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes and crimes resulting from neglect.

87 Art. 11. Negligent crimes exist: I. Where an act is done or a duty omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * III. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstances through not having previously made the investigations which the duty of his profession or the importance of the case demands.

Same code, Book Second: Civil liability in criminal matters:

Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemni-cation, and (4) payment of judicial expenses.

Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, with the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemni-zation imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing and not merely possible right is attacked, and of the
88 value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemni-zation of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

Art. 307. The payment of judicial expenses sole embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the criminal laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

Art. 310. The right to civil responsibility forms part of the estate of a decedent and descends to his heirs and successors,—provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 310, as directly damaged. Consequently, such action forms no part of the
89 estate of the deceased, nor is it extinguished although the latter pardon the offense in life.

Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed.

Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result

of the wounds of blows, or of a cause which is the immediate effect of such blows or wounds.

Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment fall- short of his daily earnings in his former occupation.

Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of
90 his disability.

Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven: that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability, shall occur in the service for which they were employed.

Art. 331. Under the condition of the preceding article those liable are * * * railroad companies.

Art. 363. (Limitation.) The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code, according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third
91 persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory law. Penal Code:

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * V. Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceedings in the former shall be stayed.

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Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged.

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92 Art. 1095. Limitation bars in three years: * * * VIII. Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals.

Act of Congress of Dec. 16th, 1881:

Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed upon Mexican territory, according to the following bases:

I. Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch at any point in the

territorial boundary line of the Republic and foreign countries or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction XXII of art. 72 of the constitution.

II. These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * *

G. Construction and repair of works: Crimes committed against the security or integrity of the works or against the operation of the lines.

H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service and for accidents and mishaps in the operation.

From the regulations for the construction, maintenance and operation of railroads:

Art. 52. The coaches and cars which enter into the make-up
93 of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

Art. 83. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman.

Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward.

Art. 124. Companies (railroad) are liable for accidents which occur through the failure to observe the provisions of this chapter (chap. 7) respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals.

Art. 184. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employés.

Art. 298. All violations of this law which companies (railway) commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them.

It was admitted on the trial that J. W. Eckman was the appointed guardian of the person and estate of Huesselmann, appointed by the county court of El Paso county, Texas, and that he, Eckman, was, at the time of the institution and trial of this case, a resident and citizen of El Paso county, Texas, and the western district of Texas.

That under said proof the court instructed the jury to find a verdict for plaintiff herein, to which charge of the court the de-
94 fendant then and there in open court excepted for the reason that the evidence showed that plaintiff was injured by the

conductor in charge of the train, who was then and there plaintiff's fellow-servant, for whose negligence defendant could not be held liable.

And defendant thereafter, before the jury had retired to consider of their verdict, prepared and presented to the court, and requested the court to give the following special charge, to wit:

"Defendant in the above styled and numbered cause request the court to charge the jury, that the evidence making it apparent herein that plaintiff was injured through the negligence of a fellow-servant of plaintiff and that under the law defendant would not be liable, and you are therefore charged to find for defendant."

Which charge the court refused to give and defendant then and there, while the jury was still in the box, excepted and now herewith tenders this its sixth bill of exceptions, asking that the same be allowed, signed and sealed by the court, and be made a part of the record herein, which is accordingly done this 7 day of May, A. D. 1901.

T. S. MAXEY, *Judge.*

O K.
PATTERSON & BUCKLER, *For Pl'ff.*

(Indorsement:) No. 261. In U. S. circuit court for W. D. of Texas, at El Paso. J. W. Eckman, guardian, etc., *vs.* Mex. Cent. R'y Co., Ltd. Deft's bill of exceptions. Filed this 9th day of May, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

95 *Certificate to United States Supreme Court.*

Filed April 15th, 1901.

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1901.

UNITED STATES OF AMERICA, *Western District of Texas.*

J. W. ECKMAN, Guardian for Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

I, T. S. Maxey, judge of said court, during this the April term, 1901, of said court, said term being the same at which the above styled and numbered cause was tried and judgment was therein rendered, this court being still in session for said term, do hereby certify that on the 5th day of ——, 189–, plaintiff brought this suit, filing therein his original petition as follows:

"In the United States Circuit Court for the Western District of Texas, at El Paso Division.

J. W. ECKMAN, Who Sues as Guardian of Alfonso Huesselmann,
vs.
THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

To the honorable United States circuit court, for the western district of Texas:

Now comes J. W. Eckman, who sues as guardian of Alfonso Huesselmann, and represents to the court that he, the said guardian, and his said ward, are resident citizens of El Paso county, Texas, and of the western district of Texas, and that the defendant, The Mexican Central Railway Company, Limited, is a railway corporation duly incorporated under the laws of, and a citizen of, the State of Massachusetts, doing business in El Paso county, Texas, and has and at all all times hereinafter mentioned has had and maintained an office and agent in El Paso county, Texas, whose name is Solon Comfort.

96 That the said defendant, The Mexican Central Railway Company, Limited, owns and operates, and at all times hereinafter mentioned has owned and operated, a line of railway from the city of Mexico, in the Republic of Mexico, to and into El Paso county, Texas, carrying on and conducting the ordinary business of a railway company as a common carrier of goods and passengers for hire. That the plaintiff, J. W. Eckman, was duly appointed guardian of the person and estate of the said Alfonso Huesselman, who is a minor, by the county court of El Paso county, Texas, at the March term, 1900, thereof, and that under said appointment he duly qualified by taking the oath and giving bond as required by law.

That on or about the 6th day of February, 1899, and for some time next prior thereto, the said Alfonso Huesselman was an employé of said defendant, engaged in the employment of brakeman on a freight train, being train No. 10 on defendant's road. That on said 6th day of February, 1899, at a siding called La Labor, on the line of the Mexican Central Railway Company from Tampico to Cardenas, he, the said Alfonso Huesselman, was ordered and directed by the conductor in charge of said train, whose name was Griffin, to go up to the train and cut the air in on two cars; that is, he was ordered and directed by said conductor to couple the air hose through the train, the said air hose reaching transversely from one car across the railroad track to the other car, and in order to the use and benefit of the air it is necessary that the two ends of the said air hose should be coupled together, and for the purpose of coupling the ends of the two air hose together it is necessary to go in between the cars and upon the railroad track between the rails. That the said conductor Griffin was in the exclusive charge of said train, which consisted of a large number of freight cars and three engines, two in front and one behind. That the said conductor was placed in charge of said train by the defendant, and that he had exclusive control of all three of said engines and the entire train,

and all of the employees about said train which consisted of
97 firemen, engineers and brakemen, were subject to the orders and control of the said conductor Griffin. That the said conductor Griffin had authority to order and signal said train when it should start and when it should stop, and that all other employees were bound to obey the signals and orders given by the said conductor Griffin. That the said train, on the 6th day of February, 1899, at the time the plaintiff was injured, as hereinafter set forth, was out on the road en route at a siding called La Labor, and that there was no one else present at that time representing the defendant, The Mexican Central Railway Company, Limited, except the said conductor Griffin. That when the said conductor Griffin gave the said Alfonso Huesselman the order to couple the ends of said air hose together, it was his duty to obey said order, and in obedience to said order he went in between two of the cars and was kneeling down on the railroad track between the rails in the act of coupling the ends of said air hose together, as it was his duty to do, and that being the only way in which the coupling could be made, the said conductor Griffin gave the engineer a signal to back said train in on the switch without giving said Alfonso Huesselman any warning or notice of his intention to give said signal. That said Alfonso Huesselman had coupled the ends of said air hose together and was in the act of arising from his kneeling position when the train started to back in upon said siding in obedience to the signal of the said conductor, as aforesaid. That at the time the said conductor gave the said Huesselmann the order to couple said air hose together, said train was standing still, and the said Huesselmann had no reason to believe or suppose that the said conductor would give a signal for the purpose of causing said train to be moved without giving him timely warning and enable him to come out from between said cars.

That the said conductor knew that it was necessary for the said Huesselmann to go in between the said cars in order to enable him to obey the order of said conductor, and to enable him to couple the ends of said air hose together, and that the said conductor
98 knew at the time he gave the engineer said signal to back said train that he, the said Husselmann, was in between said cars for the purpose of executing the order which the said conductor had just given him. That in going between said cars and in coupling the ends of said air hose together, he was in the exercise of due and proper diligence for his own safety, and was entirely without contributory negligence. That his injuries hereinafter complained of were caused solely by and through the negligence and imprudence of the said conductor in causing said train to be started without giving him notice of his intention to do so in time to have enabled him to come out from between said cars.

That when said train was started, in pursuance of the signal of the said conductor, one of the cars struck the said Huesselmann and knocked him down and ran over his right leg, and so badly crushed, mangled and bruised the same, that it became necessary to amputate the same, which was done about four inches below the right knee joint. That it was so mashed and mangled that it be-

came necessary to amputate the same twice. That the first amputation was not sufficient, and it became necessary to amputate the said limb a second time. That by reason of the injuries aforesaid the said Huesselmann suffered great physical and mental pain in consequence thereof, and has been rendered a cripple for life, and his ability to earn money as a railroad employee has been entirely destroyed, and his ability to earn money in other respects greatly and permanently lessened. That by reason of his said injuries he was confined to the hospital eight or nine months, during all of which time he suffered great pain, and during all of that time his time was a total loss to him. That at the time he was injured he was eighteen years of age and was earning about $60 a month Mexican money, which would be about $35 per month in American money. That the said conductor, on the occasion when the said Huesselmann was injured, represented the defendant, The Mexican Central Railway Company, Limited, and the order given to
99 the plaintiff to couple the ends of said air hose, and the signal given by the said conductor to the said engineer to back said train, by which the said Huesselmann was injured, as aforesaid, were done in the service for which the said conductor Griffin was employed by the defendant.

That in consequence of the said injuries herein complained of, the said Huesselmann has been damaged in the sum of fifteen thousand dollars.

That the said Huesselmann is a minor, under the age of twenty-one years, and is not therefore legally capacitated to sue and recover his said damages in his own name, and the said J. W. Eckman as his guardian prays permission to file this petition in this honorable court on behalf of the said minor Huesselmann, and that on final hearing hereof judgment shall be rendered in his favor as guardian of the said Huesselmann and for the use and benefit of the said Huesselmann, for the injuries he has sustained as aforesaid.

Plaintiff further alleges that by the laws of Mexico which now exist, and which existed and were in force at the time and place of the happening of said injuries, through defendant's negligence and imprudence, as aforesaid, and through the negligence and imprudence of the said conductor Griffin, the said Huesselmann has and had a right of action against defendant for his damages. And he says that the following were the laws of Mexico, and are now the laws of Mexico applicable in this case out of which his said right of action accrued, and by virtue of which the same now exists in the said Republic of Mexico; which said laws the said plaintiff specially pleads in this action, and hereby makes the same a part of this petition, viz:

From the federal constitution of the Mexican United States:

Art. 72. Congress has power * * * XXII. To enact laws governing the general lines of communication, and governing post-offices and mails.

Art. 97. The federal courts have jurisdiction: 1. Of all
100 questions growing out of the execution and application of the federal laws, except when the application of the law

only affects interests of individuals, in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code of Mexico:

Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes and crimes resulting from neglect.

Art. 11. Negligent crimes exist—I. Where an act is done or a duty omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science the knowing of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * III. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstances through not having previously made the investigations which the duty of his profession or the importance of the case demands.

Same code, Book Second: Civil liability in criminal matters:

Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation (3) indemni-zation, and (4) payment of judicial expenses.

101 Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing and not merely possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemni-zation imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing, and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemni-zation or subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

Art. 307. The payment of judicial expenses solely embraces those

absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the *commercial* laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

102 Art. 310. The right to civil responsibility forms part of the estate of a decedent and descends to his heirs and successors provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 315, as directly damaged. Consequently, such action forms no part of the estate of the deceased, nor is it extinguished although the latter pardon the offense in life.

Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed.

Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment fall- short of his daily

103 earnings in his former occupation.

Art. 325. If the blows or wounds caused the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extra-

ordinary indemnity, considering the social position and sex of the person and part of the body remaining crippled, lamed or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

Art. 326. No person can be charged with civil liability upon an act or omission contrary to the penal law, unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 325 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability, shall occur in the service for which they were employed.

104 Art. 331. Under the conditions of the preceding article those liable are * * * railroad companies.

Art. 363. (Limitation.) The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code, according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution but for reparation of damages, or indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory law. Penal Code:

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * V. Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceedings in the former shall be stayed.

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II. These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive

106 and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * *

G. Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines.

H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service and for accidents or mishaps in the operation.

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Art. 184. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employés.

Art. 298. All violations of this law which companies (railway) commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of
107 public works shall assess, reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them.

Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occurrence of the accident hereinbefore mentioned and now has, a right of action for his damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the United States of America, and he says that the acts of negligence upon the part of the defendant and its said conductor, complained of herein, was wrongful and actionable as hereinbefore shown by the plaintiff, in the Republic of Mexico at the time of the accident complained of and are so now, and he says that the same were then and are now wrongful and actionable in the United States of America and in the State of Texas. And the plaintiff says that by reason of the injuries received by the said Alfonso Huesselmann, he, the said Huesselmann, has suffered and sustained damages in the sum of fifteen thousand dollars, as aforesaid, for which sum he sues.

Wherefore he prays for citation and for judgment for said sum of fifteen thousand dollars, costs of suit, and general relief."

That on the 5th day of April, 1900, defendant filed its plea in abatement as follows:

"In the United States Circuit Court for the Western District of Texas, at El Paso, —— Term, 1900.

J. W. ECKMAN, Guardian,
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

Now comes defendant, The Mexican Central Railway Company, Limited, and appearing herein for the purpose of pleading to the jurisdiction of the court, says:

108 That the actual plaintiff herein, Anfonso Huesselman, was not at the time of the filing of this suit, and is not now, a citizen or a resident of this State, and that defendant, Mexican Central Railway Company, Limited, is not a resident or citizen of this State. That said plaintiff, Alfonso Huesselman, was, at the time of the filing of this suit, and is now, a resident and citizen of the State of Illinois, in which State plaintiff Huesselman's parents reside, plaintiff being a minor, and that defendant, Mexican Central Railway Company, Limited, was, at the time of the filing of this suit, and is now, a resident citizen of the State of Massachusetts. That this defendant is not incorporated under the laws of the State of Texas, and does not reside within this State, but was incorporated under the laws of the State of Massachusetts, of which State it is a citizen and resident.

Wherefore, defendant prays that this suit be dismissed.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED,
By FALVEY & DAVIS, *Attorneys.*

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

Before me, the undersigned, on this day personally appeared Waters Davis, one of the attorneys for the defendant in the above styled and numbered cause, who, after being by me duly sworn, on oath says that the facts set forth in the foregoing plea are within his knowledge true and correct.

WATERS DAVIS.

Subscribed and sworn to before me, this the — day of ——, A. D. 1900."

—— ——.

That thereafter plaintiff, on the 28th day of April, 1900, filed its demurrer to said plea in abatement as follows:

"J. W. ECKMAN, Guardian, etc.,
v.
THE MEXICAN CENTRAL R'Y CO., LIMITED. } No. 261.

109 Now comes the plaintiff and demurrers and excepts to the plea in abatement filed in this cause by the defendant, because the same is insufficient in law and presents no reason why

this cause should be abated or why this court has not jurisdiction of this cause.

Wherefore, he prays judgment of the court."

That said plea and the exception thereto coming on to be heard at a regular term of said court, to wit: on the 3rd day of May, 1900, the court, Hon. Alex. Boreman, sitting as special judge, rendered judgment thereon as follows:

"On this, the 3rd day of May, 1900, came on to be heard, in the above-styled cause, plaintiff's demurrer and exception to the plea in abatement, heretofore filed by the defendant, and the court, after hearing the same and being fully advised in the premises, does sustain said demurrer and exception; and the court finds that said plea in abatement presents no reason why this cause should be abated, or why this court has not jurisdiction of the cause.

ALECK BOARMAN, *Judge*."

That thereafter, on the 1st day of May, 1900, in due and proper time, defendant filed its bill of exceptions in due form, reciting the proceedings above and saving its exception to the action of the court with reference thereto.

That said cause was not tried at said term but was continued by operation of law until the October term.

That thereafter, at the October term of this court, defendant renewed its objection to the jurisdiction of the court by its "amended plea of privilege to be sued in the State of its residence," filed therein October 1st, 1900, which amended plea is as follows:

"In the United States Circuit Court, Western District of Texas, El Paso, Texas, October Term, A. D. 1900.

110 J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 261.

Now comes defendant, Mexican Central Railway Company, Limited, and with notice and leave of the court, amends its plea in abatement and privilege to be sued in the district of which it is an inhabitant, and for amendment says:

Defendant, appearing herein for the purpose of pleading to the jurisdiction of the court, comes and says that the actual plaintiff herein, Alphonso Huesselman, who brings this suit through one J. W. Eckman, as his guardian, was not, at the time of the filing of this suit, and is not now, a citizen or resident of this State and district, and that defendant, Mexican Central Railway Company, Limited, is not a citizen or resident of this State and district. That said Alphonso Huesselman, at the time of the filing of this suit, was eighteen years of age, and then and now was and is a minor; that the father and mother of said Huesselman, at the time of the filing of this suit, and ever since said time and now, were and are residents and citizens of the State of Illinois and not of the State of

Texas; that though it be a fact that J. W. Eckman, who purports to be guardian of said Huesselman, is a resident and citizen of this State and district, plaintiff, for the purpose of wrongfully conferring upon this court jurisdiction of this controversy and suing this defendant out of its habitat and place of residence, caused this suit to be brought in the name of said Eckman as his guardian, when, as a matter of fact, said Huesselman was, at the filing of this suit and is now a resident and citizen of the State of Illinois, in which State his parents reside. That defendant, Mexican Central Railway Company, Limited, was, at the time of the filing of this suit, and is now a resident and citizen of the State of Massachusetts, and not of this State; that the defendant is not incorporated under the laws of the State of Texas, and does not reside within this
111 State, but was incorporated solely under the laws of the State of Massachusetts, of which State it is a resident, citizen and inhabitant.

Defendant further says that it has in no way waived its right to be sued in the State of which it is an inhabitant, or consented to the jurisdiction of this court.

Wherefore, defendant says that it pleads its right to be sued in the State of which it is an inhabitant and asks that this suit be dismissed.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED,
By FALVEY & DAVIS, *Its Attorneys.*

UNITED STATES OF AMERICA, }
Western District of Texas. }

Before me, the undersigned authority, on this day personally appeared Waters Davis, one of the attorneys for defendant in the above styled and numbered cause, who, after being by me duly sworn, on oath says, that the facts set forth in the foregoing plea are within his knowledge true and correct.

WATERS DAVIS.

Subscribed and sworn to before me this 1st day of October, A. D. 1900.

[SEAL.]

D. H. HART, *Clerk,*
By J. P. HODGSON, *D'y.*"

That thereafter, on the same day, plaintiff refiled its former demurrer to said amended plea as follows:

"J. W. ECKMAN, Guardian, etc., *v.* MEXICAN CENTRAL R'Y CO., LIMITED. } No. 261.

Now comes the plaintiff and demurs and excepts to the defendant's amended plea in abatement filed in this cause by the defendant on Oct. 1, 1900, because the same is insufficient in law and

presents no reason why this cause should be abated, or why this court has not jurisdiction of this cause.

Wherefore, he prays judgment of the court."

112 That thereafter on the same day this court sustained said demur-er and the following order was therein entered:

"In the United States Circuit Court, Western District of Texas, El Paso, Texas, October Term, A. D. 1900.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 261.

On this, the 1st day of October, A. D. 1900, in the above-styled cause, came on to be heard plaintiff's demurrer and exception to the plea in abatement heretofore filed by defendant, and the court, after hearing the same, and being fully advised in the premises, does sustain said demurrer and exception, and finds that said plea in abatement presents no reason why this cause should be abated, or why this court has no jurisdiction of the cause."

That defendant then and there in open court excepted, and thereafter, in due time, on the same day, filed its bill of exceptions therein, reciting the proceedings had with reference to said plea and duly saving its exceptions to the ruling of the court thereupon.

That after this court sustained said demurrer and defendant saved its exceptions, as aforesaid, it on the same day filed its original answer therein, as follows:

"In the United States Circuit Court for the Western District of Texas, El Paso, Texas, October Term, A. D. 1900.

J. W. ECKMAN, Guardian of Alphonso Huesselman,
vs.
MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 261.

Now comes defendant in the above styled and numbered cause, after its plea of privilege has been overruled by the court, and, saving all manner of exception thereto, for answer herein says:

113 Defendant comes and pleads to the jurisdiction of this court and for further ground for said plea, presents and shows to the court:

First. That the laws of the Republic of Mexico, upon which the rights and liabilities of the parties hereto rest and are to be determined, are so vague, uncertain and dissimilar to the laws of our country that this court should not entertain jurisdiction herein and attempt to enforce the rights of the parties thereunder; that said laws have been passed upon by the decision of the supreme court of the State of Texas, to wit: in the case of The Mexican National Railway Co. *vs.* James O. Jackson, it being therein held that the

courts of this State would not sit to adjudicate controversies like the one at bar, under the laws of the said Republic of Mexico, on account of their [illegible] to our laws, and that the policy of this State and the [illegible] of this country would be to not interfere with the traffic of [illegible] having their lines in Mexico by adjudicating cases arising in Mexico; wherefore defendant says that under the statutes of the United States of America giving the jurisdiction of the circuit courts of the United States, and that part where it is said:

"That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several States of all suits of a civil nature, at common law or in equity, [illegible] in which there shall be a controversy between [illegible] of different States, in which the matter in dispute exceeds [illegible] dollars of interest and costs, the sum or value," etc.,

this court has no jurisdiction of this controversy by the reason that there is no concurrence by the courts of the State of Texas, the courts of this State having refused to take cognizance of such controversies.

Second. Plaintiff's cause of action, if any he has having arisen in the Republic of Mexico, it would be controlled by the law
111 of said Republic, and it appears that said defendant ever since plaintiff claims he was injured, has maintained its line of railroad in said Republic and continued to possess its property therein, and there is no good reason shown in said petition why plaintiff did not sue for damages for said injuries in said Republic, where his cause of action accrued, instead of bringing his suit in this court.

Third. It appears from the laws of Mexico, as set out in plaintiff's petition, that if plaintiff has any cause of action, it would be controlled by the laws of the Republic of Mexico; that according to said laws, as set out in plaintiff's petition, the suit and adjudication of the rights of plaintiff, and the awarding of damages to the plaintiff for the injuries sustained, would not be a final termination of the controversy between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time and recover in said suits if said injury is continuing or permanent.

Fourth. That according to article 313 of the laws of said Republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect a compromise, so that the amount and terms of payment be fixed by agreement between the parties; that according to said law no right of action would accrue to the plaintiff until after the judge who took cognizance of the case shall endeavor that the amount and terms of payment be fixed by agreement between the parties; that said petition fails to show that the judge of this court or any other judge having cognizance of said matter had endeavored to have the amount and terms of payment for such injuries agreed upon between the parties.

Fifth. That according to the laws of said Republic, as set out in

said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries, unless he shows that the acts of defendant which caused the injury constituted a crime under the said laws of Mexico; that the recovery in a civil suit is penal
115 in its nature; that this court cannot enforce the penal laws of the Republic of Mexico.

Sixth. That according to article 323 of the laws of the said Republic of Mexico, a recovery may be had not only for the damages sustained by the injury complained of, but the judge trying the case may award as extraordinary indimnity any sum that he may determine, considering the social position, etc., of the party injured; that said law is against natural law and the policy of our laws in discriminating in favor of or against a litigant according to his social position.

Seventh. Defendant further says that the contract of service entered into by plaintiff and defendant herein was made in the Republic of Mexico; that plaintiff's service thereunder was to be performed in said Republic, where his wages and hire were to be paid; that plaintiff's cause of action, if any he has, arose entirely within said Republic of Mexico, where defendant now and always has had and operated its railroad and business, and where all its cars and property are kept—it being at the time plaintiff claims he was injured, and at all times since said date, subject to the jurisdiction of the courts of said Republic of Mexico; that actions and suits in said Republic of Mexico are not governed by the common law, but that all rights, remedies and actions are entirely provided for and governed by the code and statutory laws of said Republic, which materially alter and change the common-law rule; that under the codes and statutes of said Republic, plaintiff would not be entitled to recover for injuries sustained by him as claimed in his petition, unless the acts of defendant causing such injuries are shown by plaintiff to constitute a crime under the penal code of said Republic; that no civil action would accrue to plaintiff in said Republic for such acts of defendant as set out in plaintiff's petition—such acts not being penal under the laws of said Republic.

Wherefore, defendant says that this court has no jurisdiction herein, and, wherefore, it prays that it be discharged with its
116 costs.

Without waiving the foregoing pleas to the jurisdiction of the court, in case the same should be overruled by the court, defendant still insisting upon the same comes and says:

First. That the defendant excepts to the allegations of plaintiff's petition and says that the same are not sufficient in law and fail to show a cause of action, and of this defendant prays judgment of the court.

Second. Defendant, by its attorneys, comes and denies all and singular the allegations of said petition, and of this it puts itself upon the country."

That this cause was not tried at said October term, but the same was continued until the present term of this court.

That thereafter, to wit: on the — day of April, 1901, plaintiff filed his demurrer to defendant's exceptions or pleas to the jurisdiction of the court as contained in its original answer, said demurrer being as follows:

"J. W. ECKMAN, Guardian, etc.,
vs.
THE MEXICAN CENTRAL R'Y CO., LIMITED.

Now comes the plaintiff and excepts to the answer of the defendant in so far as it consists of the various pleas to the jurisdiction of this court to hear and determine the cause—because said answer and pleas show no reason why this court should not try this case.

Wherefore, he prays the judgment of the court.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for Plaintiffs."

That thereafter, on the same day, the court being in session and said cause being called for trial, before either party announced ready for trial, plaintiff's demurrer to defendant's seven exceptions or pleas to the jurisdiction of the court was sustained and
117 the following order was entered, to wit:

"Defendant's seven pleas to the jurisdiction of the court were duly heard by the court, and after which hearing, the same, and all of them, were by the court overruled, to which ruling of the court the defendant then and there in open court, and while the jury were in the box, duly excepted."

The defendant then and there in open court excepted to the action of the court in sustaining said demurrer and proceeding to the trial of this case, and in due time, to wit: on the 15th day of April, filed its bill of exceptions, therein reciting the proceedings had with reference to said seven exceptions or pleas to the jurisdiction of the court, duly saving its exception to the ruling of the court thereon.

That said cause, over defendant's objection, was tried in said court at the present term and resulted in a verdict upon which judgment was entered for plaintiff for the sum of $12,000.

At defendant's request, the questions arising upon its "plea in abatement" and "amended plea of privilege to be sued in the State of its residence," and its seven pleas or exceptions to the jurisdiction of the court as averred in its "original answer," and its exceptions to the action of the court in instructing the jury to find for plaintiff, presenting the questions as to whether this court has jurisdiction to hear and determine the controversy, *is* certified to the United States Supreme Court pursuant to the authority of section 5 of March 3rd, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes;" that is to say:

First. That Alfonso Husselmann, at the time of the filing of this

suit, and now being a minor under twenty-one years of age, and his father and mother both being now alive, and at the time of the filing of this suit and now being residents, citizens and in-
118 habitants of the State of Illinois, and never having been residents, citizens and inhabitants of the State of Texas, nor the western district of Texas, and the defendant, The Mexican Central Railway Company, Limited, being incorporated under and by virtue of the laws of the State of Massachusetts, and at the time of the filing of this suit, and now, being a resident, inhabitant and citizen of said State of Massachusetts, and never having been incorporated under the laws of the State of Texas, and was not at the time of the filing of this suit a resident, inhabitant or citizen of the State of Texas or of the western district of Texas; that said J. W. Eckman, being guardian of the person and estate of said Alfonso Huesselmann at the time of the filing of this suit, and being such now, and being a resident, inhabitant and citizen of the State of Texas and of the western district of Texas, now, and at the time of the filing of this suit; has this court jurisdiction to try said cause, and does the citizenship of said guardian, J. W. Eckman, confer jurisdiction on this court, or does the citizenship of the minor and his parents control so as to defeat the jurisdiction of this court?

Second. Whether or not this court has jurisdiction to try and determine said suit, where the minor, Alfonso Huesselmann, and defendant, Mexican Central Railway Company, Limited, are not citizens of this State and district, and where the cause of action arose in the Republic of Mexico, in which Republic the contract of service was made and the services thereby contemplated were to be performed?

Third. Whether or not this court has jurisdiction to try and determine this suit under the laws of Mexico as pleaded and proved in this case, in so far as such laws give rights that are to be determined by successive suits, give the right to extraordinary indemnity, considering the social position of the injured party, and in so far as the same are vague, indefinite and dissimilar to the laws of our country and contrary to our policy?

Fourth. Where plaintiff's cause of action arose in the Republic of Mexico, and the rights are to be determined by the laws of said Republic, and where defendant has continuously kept its prop-
119 erty and operated its road in said Republic, has this court jurisdiction to hear and determine this cause in the absence of any reason shown in the pleading or proof why plaintiff did not bring his suit in the Republic of Mexico?

Fifth. Where, according to the laws of the Republic of Mexico, no civil liability exists unless the acts that give rise to the civil liability must be found to be a violation of the criminal laws of Mexico, is the enforcement of such liability penal in its nature, and can this court determine the guilt of defendant thereunder, and adjudicate the rights of the parties based upon the criminal laws of said Republic?

Signed and certified this 15th day of April, A. D. 1901, during

the present term of this court, the same being still in session for the term at which said cause was tried.

T. S. MAXEY,
Judge of the United States Circuit Court in and for the Western District of Texas, at El Paso Sitting.

O K.—
P. & B.

(Indorsement:) No. 261. J. W. Eckman, guardian of Alfonso Husselman, *vs.* Mex. Cent. R'y Co., Limited. Certificate to U. S. Sup. Court of jurisdictional points involved in the trial of this case. Filed this 15th day of Ap'l, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Petition for Writ of Error.

Filed May 9th, 1901.

J. W. ECKMAN, Guardian of Alfonso Huesselmann,
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

120 UNITED STATES OF AMERICA,
Western District of Texas.

To the honorable justices of the Supreme Court of the United States:

The petition of the Mexican Central Railway Company, Limited, shows that in the record and proceedings, and also in the rendition of a judgment of a plea in the circuit court of the United States for the western district of Texas, in a certain cause therein pending between J. W. Eckman, guardian of Alfonso Huesselmann, plaintiff, and The Mexican Central Railway Company, Limited, defendant, number 261, filed in said court at the April term thereof, A. D. 1900, in which judgment was rendered against defendant on the 4th day of April, 1901, manifest error hath intervened to the great prejudice and damage of the defendant.

Wherefore, defendant prays for the allowance of a writ of error, and such other processes as may cause the same to be corrected by the Supreme Court of the United States to be held in the city of Washington, District of Columbia.

FALVEY & DAVIS,
Attorneys for Petitioner, Mexican Central Railway Company, Limited.

Granted this 7 day of May, A. D. 1901.

T. S. MAXEY, *Judge.*

(Indorsement:) No. 261. In U. S. circuit court for western dist. of Texas, at El Paso. J. W. Eckman, guardian, etc., *vs.* Mex. Cent. R'y Co., Limited. Def't's petition for writ of error. Filed this 9th day of May, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Writ of Error Bond.

Filed May 9th, 1901.

121 In the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas, April Term, A. D. 1901.

J. W. ECKMAN, Guardian of Alfonso Huesselmann,
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIM-TED. } No. 261.

Know all men by these presents: That we, Mexican Central Railway Company, Limited, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto J. W. Eckman, guardian of Alfonso Huesselmann, his certain attorneys, executors, administrators or assigns, in the just and full sum of thirteen thousand eight hundred dollars ($13,800.00), to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of April, A. D. 1901.

Whereas, lately at a term of the circuit court of the United States for the western district of Texas, at El Paso, Texas, in a suit pending in said court between J. W. Eckman, guardian of Alfonso Huesselmann, plaintiff, and The Mexican Central Railway Company, Limited, defendant, No. 261, on the docket of said court, a judgment was rendered against said Mexican Central Railway Company, Limited, on the 4th day of April, A. D. 1901, that plaintiff recover of and from defendant the sum of twelve thousand dollars ($12,000.00) together with costs of suit, and said Mexican Central Railway Company, Limited, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to revise the judgment in the aforesaid suit, and a citation directed to said J. W. Eckman, guardian of Alfonso Huesselmann, citing and admonishing him to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the — day of ——, A. D. 1901, at a regular term of said court to be holden
122 in the city of Washington, District of Columbia, on the second Monday in October next.

Now, the condition of the above obligation is such that if the said Mexican Central Railway Company, Limited, shall prosecute its writ of error to effect, and answer all costs and damages if it shall fail to make its said plea good, then the above obligation to be void, else to remain in full force and virtue.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED,
By FALVEY & DAVIS, [L. S.]
Its Attorneys.
E. KOHLBERG. [L. S.]
[SEAL.]
HORACE B. STEVENS. [L. S.]

I hereby approve the sureties on the foregoing bond, and find the same sufficient.

D. H. HART, *Clerk*,
By J. P. HODGSON, *Deputy*.

Approved this 7 day of May, A. D. 1901.

T. S. MAXEY, *Judge*.

(Indorsement:) No. 261. In U. S. circuit court for western dist. of Texas, at El Paso. J. W. Eckman, guardian, etc., *vs.* Mex. Cent. R'y Co., Limited. Appeal bond. Filed this 9th day of May, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

123 United States of America to J. W. Eckmann, guardian of Alfonso Huesselmann, plaintiff, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court to be holden at the city of Washington, District of Columbia, within thirty days from the 10th day of June, A. D., 1901, the regular term of said court to be holden on the second Monday of October next pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, at El Paso, Texas; wherein The Mexican Central Railway Company, Limited, is plaintiff, in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the — day of ——, A. D., 1901.

Signed, this the 10 day of June, 1901 as of May 7, 1901.

T. S. MAXEY, *Judge*.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

Attest:
D. H. HART, *Clerk*,
By J. P. HODGSON, *Deputy*.

We hereby acknowledge service of the foregoing citation and waive copy service and return.

J. W. ECKMAN, *Guardian*.
PATTERSON & BUCKLER,
Attorneys for J. W. Eckman, Guardian.

[Endorsed:] Filed this 10th day of June 1901. D. H. Hart, clerk, by J. P. Hodgson, deputy.

124 J. W. ECKMAN, Guardian of Alfonso Huesselmann, } No. 261.
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. }

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea, which is in said circuit court before you or some of you, between J. W. Eckman, guardian of Alfonso Huesselmann, plaintiff, and The Mexican Central Railway Company, Limited, defendant, manifest error hath happened to the great damage of said Mexican Central Railway Company, Limited, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be holden at Washington, District of Columbia, in not exceeding thirty days from the — day of ——, A. D. 1901, the next term of said court to be held on the second Monday in October next, in the Supreme Court of the United States, to be then and there held, and the record and proceedings being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 7th day of May, in the year of our Lord, 1901

—— ——, *Judge.*

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

Attest:
D. H. HART, *Clerk,*
By J. P. HODGSON, *D'y Clerk.*

Allowed May 7, 1901.
T. S. MAXEY, *Judge.*

[Endorsed:] No. 261. In U. S. circuit court for western dist. of Texas. J. W. Eckman, guardian, etc., *vs.* Mex. Cent. R'y Co. Limited. Writ of error. Filed this 9th day of May 1901 D. H. Hart, clerk, by J. P. Hodgson, deputy.

125 *Defendant's Assignment of Errors.*

Filed April 15th, 1901.

In the United States Circuit Court for the Western District of Texas, at El Paso, Texas, April Term, A. D. 1901.

J. W. ECKMAN, Guardian of Alfonso Huesselmann,
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 261.

Now comes defendant, Mexican Central Railway Company, Limited, by its counsel, and says that in the record and proceedings of the above styled and numbered cause there is manifest error in this, to wit:

First. The court erred in assuming jurisdiction herein and sustaining plaintiff's demurrer to defendant's plea of privilege to be sued in the district of its residence, for the reason that it appeared from said plea that defendant was, at the time of the filing of this suit, and is a resident and citizen of the State of Massachusetts, and not of this State and district, and that defendant is a corporation incorporated under the laws of the State of Massachusetts, and was never incorporated under the laws of the State of Texas; that the actual plaintiff, Alfonso Huesselmann, was, at the time of the filing of this suit, and still is a resident and citizen of the State of Illinois,

126 and not of the State of Texas, the father and mother of said Huesselmann, who, at the time of the filing of his suit, and now, is a minor, are still alive and are residents and citizens of the State of Illinois, and not of the State of Texas, the parents of said Huesselmann never having renounced their authority over him, and said Huesselmann, being a minor, not having the power to change his residence or citizenship, and the county court of El Paso county having no jurisdiction to appoint a guardian for him; that the residence and citizenship of J. W. Eckman, the so-called guardian of said Alfonso Huesselmann, not being sufficient to confer jurisdiction upon this court; wherefore, the court should have overruled said demurrer and dismissed this cause for the matters set up in said plea in abatement.

Second. The court erred in assuming jurisdiction herein for the reason that the right or liability of a corporation to sue and be sued in this State depends upon the sanction of the laws thereof. That it is the policy of our State, as announced in the decision of The Mexican National Railway Company *vs.* James O. Jackson, to exclude from our courts controversies arising or accruing in the Republic of Mexico under the laws of said Republic, where no reasons are given for the institution of suits in our courts, and so that the traffic of railroads having their lines in Mexico may not be interfered with by the adjudication of causes of action arising in Mexico.

Third. The court erred in assuming jurisdiction and trying this cause for the reason that the laws of the Republic of Mexico pleaded

by plaintiff, and which are applicable to plaintiff's suit, and regulate rights and remedies herein, are so dissimilar to our laws that it is against the policy of the State of Texas, and the courts of this country to attempt the enforcement of the same.

Fourth. The court erred in assuming jurisdiction herein and adjudicating the rights of the parties under the Mexican law, for the reason that plaintiff, under said laws, could not recover of defendant without showing that the acts resulting in his injuries constituted a crime under the laws of Mexico, and for the reason that a
127 recovery in a civil suit under said laws is penal in its nature; that the laws pleaded by plaintiff did not sufficiently define acts that are made penal so as to enable the court and jury to determine the rights and liabilities of the parties therefrom; and wherefore, the court was without power and should not have attempted to enforce the same.

Fifth. The court erred in assuming jurisdiction and in attempting to enforce the liability of defendant under said laws for the reason that the contract of service entered into between plaintiff and defendant was made in the Republic of Mexico; that plaintiff's services therein were to be performed in said Republic, where his wages and hire were to be paid, and plaintiff's cause of action arose entirely within said Republic, where defendant now, and always has had and operated its railroad and business, and where its cars and property are kept; defendant being at the time when plaintiff claims he was injured, and at all times since said date, subject to the jurisdiction of the courts of said Republic of Mexico, under the laws of which defendant is entitled to have its cause adjudicated.

Sixth. The court erred in assuming jurisdiction herein for the reason that the laws of the Republic of Mexico, upon which the rights and liabilities of the parties hereto rest and are to be determined, are so vague, uncertain and dissimilar to the laws of our country that this court should not entertain jurisdiction herein and attempt to enforce the rights of the parties thereunder; that said laws have been passed upon by the decision of the supreme court of the State of Texas, to wit: in the case of The Mexican National Railway Company *vs.* James O. Jackson, it being therein held that the courts of this State would not sit to adjudicate controversies like the one at bar, under the laws of the said Republic of Mexico, on account of their dissimilarity to our laws, and the policy of this State and the courts of this country would be to not interfere with the traffic of railroads having their lines in Mexico by adjudicating cases
128 arising in Mexico; wherefore, defendant says that under the statutes of the United States of America fixing the jurisdiction of the circuit courts of the United States, and that part where it is said:

"That the circuit courts of the United States shall have original *cognizance concurrent with the courts of the several States* of all suits of a civil nature, at common law or in equity * * * (3) Or in which there shall be a controversy between citizens of different

States, in which the matter in dispute exceeds, exclusive of interests and costs, the sum or value," etc.,

this court has no jurisdiction of this controversy for the reason that there is no concurrence by the courts of the State of Texas, the courts of this State having refused to take cognizance of such controversies.

Seventh. The court erred in assuming jurisdiction herein and adjudicating the controversy, for the reason that plaintiff's cause of action, if any he has, having arisen in the Republic of Mexico, it would be controlled by the laws of said Republic; and it appears that said defendant, ever since plaintiff claims he was injured, has maintained its line of railroad in said Republic and continued to possess its property therein, and there is no good reason shown in said petition why plaintiff did not sue for damages for said injuries in said Republic where his cause of action accrued, instead of bringing his suit in this court.

Eighth. The court erred in assuming jurisdiction herein and adjudicating the controversy for the reason that it appears from the laws of Mexico, as set out in plaintiff's petition, that if the plaintiff has any cause of action it would be controlled by the laws of the Republic of Mexico; that according to said laws, as set out in plaintiff's petition, the suit and adjudication of the rights of plaintiff, and the awarding of damages to the plaintiff for the injuries
129 sustained, would not be a final termination of the controversy between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time and recover in said suits if said injury is continuing or permanent.

Ninth. The court erred in assuming jurisdiction herein and adjudicating the controversy, for the reason that, according to article 313 of the laws of said Republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect a compromise, so that the amount and terms of payment be fixed by agreement between the parties; that according to said law, no right of action would accrue to the plaintiff until after the judge who took cognizance of the case shall endeavor that the amount and terms of payment be fixed by agreement between the parties; that said petition fails to show that the judge of this court, or any other judge having cognizance of said matter, had endeavored to have the amount and terms of payment for such injuries agreed upon between the parties.

Tenth. The court erred in assuming jurisdiction herein and adjudicating the controversy for the reason that, according to the laws of said Republic, as set out in said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries, unless he shows that the acts of defendant which caused the injury constituted a crime under the said laws of Mexico; that the recovery in a civil suit is penal in its nature; that this court cannot enforce the penal laws of the Republic of Mexico.

Eleventh. The court erred in assuming jurisdiction herein and adjudicating the controversy for the reason that, according to arti-

cle 323 of the laws of the said Republic of Mexico, a recovery may be had not only for the damages sustained by the injury complained of, but the judge trying the case may award as extraordinary indemnity, any sum that he may determine, considering the social position, etc., of the party injured; that said law is against natural justice and the policy of our laws in discriminating in favor of or against the litigant according to his social position.

130 Twelfth. The court erred in assuming jurisdiction herein and adjudicating the controversy, for the reason that defendant further says that the contract of service entered into by plaintiff and defendant was made in the Republic of Mexico; that plaintiff's service thereunder was to be performed in said Republic, where his hire and wages were to be paid; that plaintiff's cause of action, if any he has, arose entirely within said Republic of Mexico, where defendant now has and always has had and operated its railroad and business, and where all its cars and property are kept,—it being at the time plaintiff claims he was injured and at all times since said date, subject to the jurisdiction of the courts of said Republic of Mexico; that actions and suits in said Republic of Mexico are not governed by the common law, but that all rights, remedies and actions are entirely provided for and governed by the code and statutory laws of said Republic, which materially alter and change the common-law rule; that under the codes and statutes of said Republic, plaintiff would not be entitled to recover for injuries sustained by him as claimed in his petition, unless the acts of defendant causing such injuries are shown by plaintiff to constitute a crime under the penal code of said Republic; that no civil action would accrue to plaintiff in said Republic for such acts of defendant as set out in plaintiff's petition,—such acts not being penal under the laws of said Republic.

Thirteenth. The court erred in assuming jurisdiction herein and instructing the jury to find for the plaintiff under the Mexican laws as proved, and under the testimony concerning the laws of the Republic of Mexico, under which this cause was tried, and erred in finding that said defendant was guilty of a violation of the penal laws of the Republic of Mexico, for the reason that the court had no jurisdictional power to enforce the penal statutes of said Republic of Mexico.

Fourteenth. The court erred in assuming jurisdiction herein and in instructing the jury to find a verdict in favor of the plaintiff under the laws of Mexico and the evidence concerning the

131 same, before first endeavoring to effect a compromise between the parties, which the evidence fails to show was attempted by the court, as provided by article 313 of the Mexican code, it being a condition precedent to the right of the plaintiff to recover that the judge taking cognizance of a civil action should first attempt to effect a compromise between the parties.

Fifteenth. The court erred in assuming jurisdiction and in instructing the jury to find a verdict in favor of the plaintiff under the laws of Mexico, and the testimony concerning said laws proved upon the trial of said cause, for the reason that the same showed

that the plaintiff's cause of action arose in the Republic of Mexico; that defendant had its railroad business, and all its cars and property, in said Republic; that the actual plaintiff herein was a resident and citizen of the State of Illinois, and not of the State of Texas, and that defendant herein was a resident and citizen of the State of Massachusetts, and not of the State of Texas, and that the proof failed to show any reason why plaintiff brought his suit in this court instead of bringing the same in the Republic of Mexico, and in the courts of said Republic which had jurisdiction of the parties and the subject-matter.

Wherefore, defendant, Mexican Central Railway Company, Limited, prays that the judgment rendered against it by the United States circuit court for the western district of Texas be reversed and that this cause be dismissed for want of jurisdiction.

FALVEY & DAVIS,
Att'ys for Defendant.

(Indorsement:) No. 261. J. W. Eckman, guardian of Alfonso Husselman, *vs.* The Mex. Cent'l R'y Co., Limited. Defendant's assignment of errors. Filed this 15th day of Ap'l, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

132 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States, in and for the western district of Texas, at El Paso, hereby certify that the foregoing 131 pages besides this contain a true and correct copy of the proceedings had (as therein stated) in cause No. 261, J. W. Eckman, guardian of Alfonso Huesselmann, plaintiff, *vs.* The Mexican Central Railway Company, Limited, defendant, except that the original citation in error and writ of error are included therein instead of the copies thereof, as fully as the same remains on file and of record in my office at El Paso, Texas.

Witness my hand and the seal of the circuit court, at office, in the city of El Paso, Texas, this the 10th day of June A. D. 1901.

D. H. HART, *Clerk*,
By J. P. HODGSON, *Deputy*.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

Endorsed on cover: File No. 18,211. W. Texas. C. C. U. S. Term No. 124. The Mexican Central Railway Company, (Limited) plaintiff in error *vs.* J. W. Eckman, guardian of Alfonso Huesselmann. Filed June 27th, 1901.

Office Supreme Court U.S.
FILED
JAN 13 1902
JAMES H. McKENNEY,
Clerk.

No. 358. 124

Motion to advance.

IN THE SUPREME COURT OF THE UNITED STATES AT WASHINGTON, D. C.

Filed January 13, 1902.

Motion to Advance.

NO. 358.

The Mexican Central Railway Company, Limited,
Plaintiff in Error,

VERSUS

J. W. Eckman, Guardian of the person and estate of Alfonso Huesselmann,
Defendant in Error.

MILLARD PATTERSON,
Attorneys for the Defendant in Error,
J. W. Eckman, Guardian, Etc.

PATTERSON & ORR, PRINTERS.

IN THE SUPREME COURT OF THE UNITED STATES AT WASHINGTON, D. C.

Motion to Advance.

NO. 358.

The Mexican Central Railway Company, Limited,
Plaintiff in Error.

VERSUS

J. W. Eckman, Guardian of the person and estate of Alfonso Huesselmann,
Defendant in Error.

Now comes the defendant in error, J. W. Eckman, Guardian of the person and estate of Alfonso Huesselman; and moves the court to advance this cause on the docket of this court for the following reasons, to-wit:

The only question in issue is the question of the jurisdiction of the court below, to-wit, the Circuit Court in and for the Western District of Texas, to hear and determine this cause. Two

questions are raised challenging the jurisdiction of the court below, both of which are certified by the presiding judge of the court below to this court for its determination. The first question is, in a suit by a guardian of the person and estate of a minor appointed by the proper court in the State of Texas, in which state the Guardian and Ward reside, and of which the Guardian is a citizen, against a railway company chartered by the laws of the State of Massachusetts, where it has its legal domicile and citizenship, does the residence and citizenship of the Guardian control the question of jurisdiction, or is it controlled by the citizenship of the Ward.

The second question is, can an American citizen residing in the County of El Paso, State of Texas, and in the Western District of Texas, and being a citizen of the State of Texas, maintain an action against a railroad corporation chartered under the laws of the State of Massachusetts, in which state it has its legal citizenship, for personal injuries, happening through the negligence of the railroad company to such American citizen while in the employment of such railroad company in the Republic of Mexico, it having a local agent representing it in El Paso County, Texas, upon whom service was legally had.

A brief statement of the facts are as follows: Alfonso Huesselmann, the Ward of J. W. Eckman, the Guardian, is a minor, and was employed by the plaintiff in error, the Mexican Central Railway Company, Limited, as a brakeman in the Republic of Mexico, and while performing his duty he received severe personal injuries on account of the negligence of the plaintiff in error. Subsequent to his injuries he removed to the State of Texas where he resided continously up to the time of the

trial of this case. Before this suit was instituted, J. W. Eckman, who was a citizen and a resident of El Paso County, in the state of Texas, was appointed the statutory Guardian of the person and estate of the minor, Huesselman. After his appointment as such Guardian, he instituted suit against the plaintiff in error for the injuries sustained by his ward in the Republic of Mexico. The plaintiff in error claims, that in as much as the Ward is a minor, and his parents are living in the State of Illinois, that the legal residence and citizenship of the minor is that of his parents, and that his citizenship, and not the citizenship of his Guardian, will control.

The plaintiff in error is a railroad corporation duly and legally incorporated under the laws of the State of Massachusetts, where it has its legal citizenship, but is doing business in El Paso County, State of Texas, where it has a local agent representing it. Service was had upon such local agent, the plaintiff in error appeared and pleaded to the jurisdiction of the court on the two grounds set out in this motion. Its plea to the jurisdiction was disallowed and overuled by the trial court. Upon the application of the plaintiff in error the question of jurisdiction was certified to this court by the trial court. The Guardian in the trial court recovered a judgment for his said Ward for damages on account of personal injuries sustained in Mexico.

The reason why the defendant in error makes this motion to advance this cause is, that the only issue involved in the case is one of jurisdiction, and he believes that both questions have been heretofore determined by this court in other causes, and that the matter is one of great importance to the defendant in error, and, as he believes the plea to the jurisdiction is wholly without merit

and that the cause should be advanced that it may be speedily determined.

With this motion the defendant in error has filed a printed brief in which are cited the authorities upon both questions involved.

Wherefore, the defendant in error prays that this cause may be advanced upon the docket of this court, and upon final hearing of the same that it may be affirmed.

Respectfully submitted.

Millard Patterson

Attorney for the Defendant in Error.

No. 124.

FILED
DEC 4 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Brown, Britton & Richards
for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Dec. 4, 1902.

No. 124.

THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. W. ECKMAN, GUARDIAN OF ALFONSO HUESSELMANN, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4957

15462

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 124.

THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. W. ECKMAN, GUARDIAN OF ALFONSO HUESSELMANN, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is brought here by writ of error to the United States circuit court for the western district of Texas, issued under the provisions of the fifth section of the act of March 3, 1891, to determine the jurisdiction of said court therein. The record whereon such jurisdictional questions arise is fully certified by the court below (Rec., 63 80).

The suit is brought by J. W. Eckman, as guardian of Alfonso Huesselmann, a minor, for the recovery of damages for injuries sustained by Huesselmann in the Republic of Mexico,

while in the employ of plaintiff in error as brakeman on the line of its road. Plaintiff's petition (Rec., 1–9) in substance alleges that he sues as guardian of Huesselmann, who is a minor, having been duly appointed guardian of his person and estate by the county court of El Paso county, Texas, and having duly qualified as such; that on February 6, 1899, Huesselmann, being at that time employed by the railway company as a brakeman on one of its freight trains, whilst engaged under the orders of the conductor in coupling the air hose on said train at a siding called La Labor, on the line of the company's railway between Tampico and Cardenas, in the Republic of Mexico, was by the backing of said train knocked down and run over by one of the cars thereof and his right leg so injured as to necessitate its amputation; that said injuries were caused solely by the negligence of the conductor of the freight train, who was acting as the representative of the railway company; that by the laws of Mexico Huesselmann has a right of action against the company, and that in consequence of the injuries complained of Huesselmann has been damaged in the sum of fifteen thousand dollars, for which and for his costs plaintiff prays judgment. The petition sets out *in extenso* those sections of the federal constitution of Mexico, the Mexican penal and civil codes, and the acts of the Mexican congress upon which plaintiff bases his right of action (Rec., 4–8).

To this petition defendant filed its plea in abatement (Rec., 9, 10), setting forth that the actual plaintiff, Huesselmann, is not a citizen or resident of the State of Texas, but is a citizen and resident of the State of Illinois; that defendant is a resident and citizen of the State of Massachusetts, and has not waived its right to be sued in the State of its

residence, and hence plead its right to be sued in the State of which it is an inhabitant, and asked that suit be dismissed. To this plea plaintiff excepted and demurred (Rec., 11), which demurrer and exception the court sustained (Rec., 11), and to that ruling of the court defendant has duly excepted (Rec., 16–18).

Its plea in abatement having been overruled, defendant filed its answer (Rec., 12–13), setting up seven separate pleas to the jurisdiction of the court, excepting to the plaintiff's petition for insufficiency in law, and traversing the allegations thereof. To the pleas to the jurisdiction contained in defendant's answer plaintiff demurred (Rec., 14), and upon said demurrer all of said pleas were overruled (Rec., 25, 73); to which ruling defendant duly excepted (Rec., 26, 78).

Thereupon, over defendant's objection, the cause was tried before a jury, who rendered a verdict for plaintiff, and judgment was entered thereon in plaintiff's favor in the sum of $12,000 and costs (Rec., 78).

It is not deemed necessary to burden this brief with a repetition of the assignments of error which are set forth in the printed record at pages 84 to 88. The questions presented thereby are certified by the court below, as follows (Rec., 78, 79):

"*First.* That Alfonso Huesselmann, at the time of the "filing of this suit, and now being a minor under twenty-"one years of age, and his father and mother both being "now alive, and at the time of the filing of this suit and "now being residents, citizens and inhabitants of the State "of Illinois, and never having been residents, citizens and "inhabitants of the State of Texas, nor the western district "of Texas, and the defendant, The Mexican Central Rail-"way Company, Limited, being incorporated under and by

"virtue of the laws of the State of Massachusetts, and at "the time of the filing of this suit, and now, being a resi- "dent, inhabitant and citizen of said State of Massachu- "setts, and never having been incorporated under the laws "of the State of Texas, and was not at the time of the filing "of this suit a resident, inhabitant, or citizen of the State of "Texas or of the western district of Texas; that said J. W. "Eckman, being guardian of the person and estate of said "Alfonso Huesselmann at the time of the filing of this suit, "and being such now, and being a resident, inhabitant and "citizen of the State of Texas and of the western district of "Texas now, and at the time of the filing of this suit; has "this court jurisdiction to try said cause, and does the citi- "zenship of said guardian, J. W. Eckman, confer jurisdic- "tion on this court, or does the citizenship of the minor "and his parents control so as to defeat the jurisdiction of "this court?

"*Second.* Whether or not this court has jurisdiction to try "and determine said suit, where the minor, Alfonso Huessel- "mann, and defendant, Mexican Central Railway Company, "Limited, are not citizens of this State and district, and "where the cause of action arose in the Republic of Mexico, "in which Republic the contract of service was made and "the services thereby contemplated were to be performed?

"*Third.* Whether or not this court has jurisdiction to try "and determine this suit under the laws of Mexico as "pleaded and proved in this case, in so far as such laws give "rights that are to be determined by successive suits, give "the right to extraordinary indemnity, considering the social "position of the injured party, and in so far as the same are "vague, indefinite, and dissimilar to the laws of our country "and contrary to our policy?

"*Fourth.* Where plaintiff's cause of action arose in the "Republic of Mexico, and the rights are to be determined "by the laws of said Republic, and where defendant has "continuously kept its property and operated its road in

"said Republic, has this court jurisdiction to hear and de-
"termine this cause in the absence of any reason shown in
"the pleading or proof why plaintiff did not bring this suit
"in the Republic of Mexico?

"*Fifth.* Where, according to the laws of the Republic of
"Mexico, no civil liability exists unless the acts that give
"rise to the civil liability must be found to be a violation of
"the criminal laws of Mexico, is the enforcement of such
"liability penal in its nature, and can this court determine
"the guilt of defendant thereunder, and adjudicate the
"rights of the parties based upon the criminal laws of said
"Republic?"

ARGUMENT.

I.

The citizenship of the ward, the actual plaintiff, not that of the guardian, the nominal plaintiff, controls.

By the first question certified by the circuit court, *supra*, the point presented for the consideration of this court is whether Huesselmann, being a minor, and his parents being residents and citizens of the State of Illinois, and the defendant being a corporation organized under the laws of Massachusetts and a resident of that State, the defendant is suable in the United States circuit court for the western district of Texas. This question was raised by the defendant's amended plea in abatement (Rec., 9), which was overruled by the court below (Rec., 11); to which the defendant duly excepted (defendant's third bill of exceptions, Rec., 16, 17).

There can be no dispute as to the fact that Huesselmann is a citizen of Illinois. In his testimony (Rec., 29) Huessel-

mann admits that his parents are both living and residents of Illinois and have never lived in Texas. It is a settled rule of law that an infant cannot change his own domicil, but his domicil remains that of his parents (*Lamar v. Micou*, 112 U. S., 452, 470; *Hardy v. De Leon*, 5 Tex., 211; *Trammell v. Trammell*, 20 Tex., 406, 417; *Franks v. Hancock*, 1 Tex. Unrep. Cas., 554; *Kennedy v. Ryall*, 67 N. Y., 379; *Potinger v. Wightman*, 3 Meriv., 67; *Dedham v. Natick*, 16 Mass., 135; *Dresser v. Edison Illuminating Co.*, 49 Fed. Rep., 257; *Dicey on Domicil*, 97, 99). It is equally settled that the guardian has no power to change the domicil of the ward. In *Lamar v. Micou, supra*, Mr. Justice Gray, speaking for the court, said (p. 472):

> "It is quite clear that a guardian appointed in a "State in which the ward is temporarily residing "cannot change the ward's permanent domicil from "one State to another."
>
> See also *Trammell v. Trammell*, 20 Tex., 406, 417; *Daniel v. Hill*, 52 Ala., 430; *Wynn v. Bryce*, 59 Ga., 529; *Vennard's Succession*, 44 La. Ann., 1076; *Mears v. Sinclair*, 1 W. Va., 185; *Marheineke v. Grothaus*, 72 Mo., 204; *Garrison v. Lyle*, 38 Mo. App., 558.

It is admitted that the railway company is a Massachusetts corporation and resident in that State (Rec., 1).

To determine, therefore, whether the citizenship of the parties could confer jurisdiction upon the court below, it remains simply to determine whether the citizenship of the guardian or of his ward controls. It is the settled doctrine of this court that, where the citizenship of the parties is the jurisdictional ground, the court in determining the ques-

tion of jurisdiction looks to the citizenship of the real parties in interest, not to that of merely nominal parties. Thus, in *Huff v. Hutchinson*, 14 How., 586, the fact that a marshal suing on an attachment bond was a citizen of the same State as the defendants was held not to oust the Federal court of jurisdiction, where the judgment creditors, the real plaintiffs in interest, were citizens of another State. And in cases where a State, or an official thereof, brings suit upon a bond for the use of another, the court looks only to the citizenship of the defendants and the persons for whose use the action is brought (*Brown v. Strode*, 5 Cr., 303; *McNutt v. Bland*, 2 How., 9; *Maryland v. Baldwin*, 112 U. S., 490; *Indiana v. Glover*, 155 U. S., 513). In cases where a person under disability, whether infant, *feme covert*, or *non compos mentis*, sues by next friend, the Federal courts have uniformly held that the citizenship of such persons, not that of the next friend, determines the jurisdiction of the court (*Williams v. Richey*, 3 Dill., 406; *Ruckman v. Palisade Land Co.*, 1 Fed. Rep., 367; *Woolridge v. McKenna*, 8 Fed. Rep., 650; *Wiggins v. Bethune*, 29 Fed. Rep., 51; *Voss v. Neineber*, 68 Fed. Rep., 947; *Blumenthal v. Craig*, 55 U. S. App., 8; 26 C. C. A., 427).

In this case the suit is brought by the guardian of the infant, instead of by his next friend, the statute of Texas (Sayles' Tex. Civ. Stats., article 2623) providing that the guardian of the estate may bring or defend suits by or against his ward. The same rule, however, applies to suits brought by guardian as to those brought by next friend. The guardian, like the next friend, is a formal party and the citizenship of the ward, not that of the guardian, controls. Where there is no guardian the suit is brought by

next friend; where a guardian has been appointed he may, in some jurisdictions, as in Texas, bring and defend suits for his ward, but in so doing he acts either as next friend or guardian *ad litem*, his function in either case being precisely the same. The guardian is not like an executor, administrator, or trustee; his powers and duties are essentially dissimilar. In the case of executors, administrators, or trustees the title to the property is in them, not in the beneficiary. But in the case of a guardian, the title to the property is not in him, but in his ward. The guardian only holds and manages the property of the ward until such time as the disability of the ward, whether it be infancy, insanity, or coverture, in removed, and when it is removed the ward steps in and assumes or resumes control of that which has always been his. In the case of the executor, administrator, or trustee title to the property can never vest in the beneficiary until the trust be fulfilled; in the case of the guardian the title to the property has never vested in him, but has always remained in the ward. This distinction was pointed out by Mr. Justice Gray in delivering the opinion of this court in the case of *Lamar v. Micou*, 112 U. S., 452, where he says (p. 472):

> "The case of a guardian differs from that of an "executor of, or a trustee under, a will. In the one "case, the title in the property is in the ward, and "the guardian has only the custody and manage- "ment of it, with power to change its investment."

The case of *Dodd v. Ghiselin*, 27 Fed. Rep., 405, was a suit brought in the Federal court by two minors, citizens of Texas, by their curator, a citizen of Missouri, against a citi-

zen of Missouri. The bill was demurred to on the ground that the court had no jurisdiction by reason of the citizenship of the parties. Mr. Justice Brewer, then circuit judge, in overruling the demurrer said (p. 406):

> "The case of *Coal Co. v. Blatchford*, 11 Wall., 172, is "cited, which holds that trustees and executors, suing "for others' benefit, are the parties holding the legal "title and the ones whose citizenship determines the "jurisdiction of the Federal court. But the title to "the property of a minor is in the minor. The cura- "tor or guardian represents him but does not have "the title;" citing *Lamar v. Micou, supra.*

The case of *Wilcoxen v. Chicago, Burlington and Quincy R. R. Co.*, 116 Fed. Rep., 444, is directly in point. The case came up on motion to remand to the State court, and in denying the motion the facts are thus stated by McPherson, D. J.:

> "This case was brought by the title above given "in the district court of Wapello county, Iowa. The "action is for a personal injury suffered by the said "Eslinger by reason of the alleged negligence of the "defendant. Subsequently Eslinger became insane, "by reason of said injury, as alleged. * * * "Within the time fixed by law the defendant filed in "the State court its petition for a removal to this "court of the case. * * * It was sufficient in all "respects to obtain a removal, unless it be with refer- "ence to the diverse citizenship."
>
> * * * * * * *
>
> "The defendant company now is, and for many "years has been, a corporation organized and exist- "ing under the laws of Illinois, and therefore a citizen "of that State. Eslinger, the person injured, was,

"when injured, and at all times since has been, a "citizen of Iowa. The guardian, Wilcoxen, was when "this action was commenced, and at all times since "has been a citizen of Illinois. This guardian was "appointed by the district court of Wapello county, "Iowa, sitting in probate. Therefore we have these "facts: The guardian is a citizen of Illinois. The "insane man for whose use and benefit the action is "brought is a citizen of Iowa. Can the action be re- "moved to this court on the ground of diverse citizen- "ship? Or does the citizenship of Eslinger, the insane "man, control? As the guardian, Wilcoxen, and the "defendant company are both citizens of Illinois, if "the citizenship of the guardian controls, this case "must be remanded. But as the insane man, Es- "linger, for whose use and benefit the action is "brought, is a citizen of Iowa, and the defendant com- "pany is a citizen of Illinois, the motion to remand "must be denied, and this court will retain jurisdic- "tion, provided it is the citizenship of the insane man "which governs. That all moneys recovered in this "action, if any are recovered, will go to Eslinger, the "insane man, and that Wilcoxen will receive nothing "beyond his reasonable compensation, need only be "stated."

The learned judge, after reviewing the statutes of Iowa with respect to the powers and duties of guardians, which are similar to those of Texas, says (p. 446):

"These statutes persuade me that the rule in Iowa "is, as perhaps it is elsewhere, as well as at common "law, that the title to the property is in the ward, and "not in the guardian. The guardian controls and "can manage, but has no title nor ownership, and "can only control subject to the direction of the court

"appointing him. And it being true, that the ward "has the title, and the guardian only the right of "control, is to me of importance."

He then reviews at length the decisions as to who are merely formal parties whose citizenship does not affect the jurisdiction, and concludes (p. 448):

"This court is one of limited jurisdiction, and its "jurisdiction must always be made to clearly appear. "If I were in doubt, I would remand the case. But "I am not in doubt. It clearly appears to me that "the State court was ousted of jurisdiction when the "petition and bond was filed, and the filing of the "record in this court, and that this court took juris-"diction when the record was thus filed.

"I have assumed that the guardian was regularly "and lawfully appointed. I have not considered "whether the State court had authority to appoint a "citizen of Illinois as guardian of an insane citizen "and resident of Iowa, with no estate excepting in "Iowa. And, whatsoever the purpose was in thus "securing the appointment of a citizen of Illinois to "act as guardian, *the fact that the ward is a citizen of "Iowa and the defendant a citizen of Illinois in my "opinion gives this court jurisdiction.*"

II.

The laws of Mexico as pleaded and proved and which are relied on to support this cas are so vague and indefinite and so dissimilar to the laws of Texas as to be incapable of enforcement in our courts, and are inconsistent with the statutes and public policy of Texas.

It is proper here to state that the decisions of the circuit court of appeals for the fifth circuit, as rendered in the cases of *Evey v. Mexican Central Railway Company*, 52 U. S. App., 118; 26 C. C. A., 407; *Mexican Central Railway Company v. Marshall*, 34 C. C. A., 133; *Mexican Central Railway v. Murray*, 42 C. C. A., 334, and *Mexican Central Railway Company v. Eckman*, *id.*, 344, are opposed to the contention here maintained. The opinions delivered by Judge Pardee in the three former cases and that of Judge McCormick in the latter case, following the decision of the *Murray* case, held that the laws of Mexico there pleaded, which are substantially the same as those pleaded in this case, are not so dissimilar as to be incapable of enforcement in our courts.

It is, however, submitted, with all due deference to the opinion of that learned court, that the laws of Mexico, on which this action is based, *are* so vague, so indefinite, and so dissimilar to the laws of the State of Texas, and therefore, in the absence of any statute of the United States modifying the State law, so dissimilar to the law of the *forum* as to be incapable of enforcement, and in this we are supported by the decisions of the highest court of the State of Texas. In the case of the *Mexican National Railway Company v. Jackson*, 89 Tex., 107, a case similar to the one at bar

and in which the same statutes of Mexico were relied on the supreme court of Texas, the highest court of that State, reviews those statutes and compares them with the statutes of Texas and with the common law, *pointing* out the differences and showing the impracticability of administering them in our tribunals. The consideration of these questions is so thorough and the reasoning of the court so apt that we set forth its opinion *in extenso*.

The court says (p. 113):

> "Many difficulties would present themselves in an "attempt to determine the meaning of the Mexican "law and to apply it in giving redress to the parties "claiming rights under it. We understand the Mex- "ican courts are not governed by precedent, and we "have no access to reports of adjudicated cases of those "courts from which we could ascertain their interpre- "tation of these laws. The language of some of the "articles quoted is ambiguous, and we find great dif- "ficulty in determining what would be a proper in- "terpretation of the law. We might or might not "give the same effect to the language that is given to "it in the courts of Mexico. There could be no rea- "sonable certainty that the parties' rights would be "adjusted here as they would be if the case were tried "in the courts of that country, which is their right, "for it is well settled that, if one State undertakes to "enforce a law of another State, the interpretation of "that law as fixed by the courts of the other State is "to be followed. This difficulty of itself furnishes a "sufficient reason for the courts of this State to de- "cline to assume jurisdiction of this class of cases.
>
> "We will briefly compare some of the provisions of "the law of Mexico with the law of this State, show- "ing wherein they differ, and the impracticability of

"attempting to administer them here. By the Mexi-
"can law the plaintiff's right does not rest upon the
"fact of negligence on the part of the defendant, but
"such negligence, in order to give a right of action,
"must be of such character as to make the act a
"crime under that law. We must first determine
"whether the defendant would be subject to a crimi-
"nal prosecution in Mexico, before we can proceed to
"administer the remedy provided for the wrong.
"If it is not a crime, no right of action exists, no
"matter how grossly negligent may be the act which
"caused the injury. While this is not a criminal
"prosecution, in the sense that a punishment for a
"crime is to be inflicted in this suit, it does re-
"quire a determination of the guilt of the defendant
"in order to give relief to the plaintiff. In this
"State, under the facts of this case, no such prosecu-
"tion could be maintained, nor in any case is the
"right of recovery made to depend upon the crimi-
"nality of the act; however, in some cases a recovery
"cannot be had except upon proof of facts which
"would show the act to be contrary to a penal stat-
"ute. The acquittal of the defendant under the
"Mexican law does not bar the right to recover in a
"civil proceeding, but the civil action for damages is
"suspended by the pendency of the criminal prosecu-
"tion, if such has been commenced, until its final
"determination. If a suit were pending in a court
"of this State under that law, and a criminal proceed-
"ing should be inaugurated in the courts of Mexico,
"the court here could not recognize this requirement
"of the law of that country, and stay the action until
"the prosecution there had been concluded. We
"can see no reason for the requirement of the law of
"Mexico, that the civil proceeding should be stayed
"during the prosecution of the criminal charge ex-

"cept that the Government would thereby secure the "presence of the injured party as a witness, and his "aid in the punishment of the guilty party. To per- "mit such suits to be maintained in our courts would "enable the plaintiffs therein to evade the laws of "that country in that particular, and would be against "the policy of that government. While it is true "that this is not a prosecution for the crime as such, "nor a suit for a penalty, it is so closely related to "that class of proceedings, that the courts of this State "should not aid in the enforcement of rights arising "under those laws which practically require the de- "fendant to be tried for a crime in the civil action.

"Under the laws of Mexico the judge before whom "the civil action is commenced is required to induce "the parties to adjust their differences and settle their "grievance by agreement, if he can do so. This our "courts cannot do. If this be regarded as matter of "procedure, it is of a character which may involve a "substantial benefit to the parties, of which the de- "fendant would be deprived by permitting the action "to be prosecuted in the courts of this State.

"If we conclude that the plaintiff is entitled to "relief, then we must determine what he has a right "to recover, and what protection the defendant is en- "titled to receive by the judgment of the court under "the law proved in this case. By that law the plain- "tiff would be entitled to recover for all actual dam- "ages existing at the time of the trial, and such as "must necessarily result therefrom. By our law he "would recover for all such damages, and for all such "as might probably thereafter result from the injury. "Thus, under our law, the plaintiff would have a "present right to that which he could not recover by "the terms of the Mexican law except by subsequent "actions therefor. If the plaintiff remain lamed or

"crippled, disfigured or maimed by the injury, the "Mexican law permits the judge to give, in addition "to the actual damages, what is termed extraordinary "indemnity, in a sum that might be by the judge "deemed proper considering the plaintiff's social "condition. How could a court in Texas ascertain "what this extraordinary indemnity is to be? Is it "compensatory or vindictive damages? In this State "a party by reason of social position is not entitled to "more or less compensation for such an injury, and "our courts could not afford this relief.

"The plaintiff would have the right under the law "of that country, by subsequent suits, to recover for "any damages that might arise out of the injury after "the first judgment was rendered, while in our courts "the whole sum must be adjudged in one proceeding. "After a judgment in Texas for all damages, exist- "ing and prospective, the plaintiff might, in the courts "of that country, recover for injuries subsequently "developed which might be included in the judg- "ment of the Texas court, and thus a double recovery "be had.

"Under the laws of Mexico the defendant would be "liable for injuries to plaintiff's family or to third per- "sons growing out of the injury inflicted upon plaintiff. "What this might comprehend we do not know; it "might include a part of what would be adjudged in "the judgment in a Texas court or it might not. At "any rate, it appears to be a different right to any- "thing known to the laws of Texas, and in favor of "persons who could not, under our law, maintain any "action for the alleged injury.

"If the plaintiff should recover from his injuries, "to the extent that he would become able to pursue "an occupation suitable to his education and social "position, the defendant would have the right under

" that law to have the payment of damages awarded
" for diminished capacity to earn money reduced by
" the amount that plaintiff could earn in such em-
" ployment. In this State no judgment could be
" rendered which would secure that right, but the
" judgment must be entered for all probable future
" losses; hence, the future earnings, no matter how
" great they might prove to be, could not go to reduce
" the damages already paid under such judgment as
" would be rendered in Texas. How this right would
" be secured in Mexico we cannot see unless payments
" were required by the judgment to be made in install-
" ments, or that future inability to earn money not
" being considered upon the first trial, the matter
" would be settled in subsequent suits to recover
" for such damages. In any event it is a right of the
" defendant which no court of this State can secure
" by its judgment.

" There are many points of dissimilarity between
" the laws of Mexico, as proved in this case, and the
" law of this State applicable to the same subject,
" which we have not mentioned, but those noticed are
" sufficiently numerous and material to show that the
" courts of Texas should not undertake to adjudicate
" the rights of parties arising under those laws, for
" torts committed in that country; indeed, as we
" have shown, they could not properly determine the
" rights of parties arising under those laws. The
" cases of Railway *v.* Richards, 68 Texas, 375, and
" Railway *v.* McCormick, 71 Texas, 660, were actions
" for damages caused by the death of the injured
" party, but they were decided upon the same princi-
" ples that apply to this case; that is, that the courts
" of Texas would not entertain such actions if founded
" upon a law which is materially different from the
" law of this State. The cases cited are sustained by

"the weight of authority and are conclusive of the "question in this State.

"There are other sufficient reasons why our courts "should not attempt to enforce the Mexican law in "cases like this. The reason which influences the "courts of one State to permit transitory actions for "torts to be maintained therein, when the right ac- "crued in a foreign State or country is that the de- "fendant having removed from such other State or "country cannot be subjected to the jurisdiction of the "courts where the cause of action arose, and as matter "of comity, but more especially to promote justice, "the courts of the place where he is found will en- "force the rights of the injured party against him, "because it would be unjust that the wrongdoer should "be permtted, by removing from the country where "he inflicted the injury, to avoid reparation for the "wrong done by him. In this case there has been "no removal of the person or property of the defend- "ant. Its railroad remains, as it was at the time of "the injury, within the jurisdiction of the courts of "Mexico, and it is liable to suit there according to "the laws of that country. The reason for permit- "ting the action to be prosecuted in our courts does "not obtain in this case; the plaintiff has voluntarily "resorted to the jurisdiction of our courts when his "rights could be better adjudicated in Mexico.

"The Mexican National Railroad is an important "public highway in the Republic of Mexico, by "which the commerce of that country is largely car- "ried on with our people. Every judgment for "damages rendered against it reduces its revenues, "which must of necessity be restored through its "charges for transportation of persons and prop- "erty, and in the main must be paid by that people. "It is but just, and perhaps necessary to a proper

"maintenance of that means of transportation, that "the country in which it is operated should deter- "mine the charges to be enforced against it. If Texas "should open her courts to all persons that may be "injured in Mexico in the management of that rail- "road and others, it may seriously affect the means of "commerce between this State and that Republic. "Thus it becomes a matter of public concern, and a "proper subject for our consideration in this connec- "tion, in view of the fact that the railroad company "is still subject to that jurisdiction. Justice does not "demand the exercise of the jurisdiction, and comity "between the governments of this State and Mexico "would seem to forbid that we should do so (Thomas "*v.* Gardner, 14 Johns, 134; Johnson *v.* Dalton, 1 "Cow., 543).

"There are at this time two systems of railroads "extending from the borders of this State into Mexico "for several hundred miles each, and as that country "shall hereafter develop, and commerce between the "two countries become more extended, we may expect "other lines to be constructed in the same direction. "If our courts assume to adjust the rights of parties "against those railroads growing out of such facts, as "in this case, we will offer an invitation to all such "persons, who might prefer to resort to tribunals in "which the rules of procedure are more certainly "fixed and the trial by jury secured, to seek the "courts of this State to enforce their claims. Thus "we would add to the already overburdened condi- "tion of our dockets in all the courts, and thereby "make the settlement of rights originating outside the "State, under the laws of a different government, a "charge upon our own people. If the facts showed "that this was necessary in order to secure justice, "and the laws were such as we could properly enforce,

> "this consideration would have but little weight, but "we feel that it is entitled to be considered where the "plaintiff chooses this jurisdiction as a matter of con- "venience and not of necessity.
>
> "We conclude that the district court and the court "of civil appeals erred in not dismissing this case "under the proof made, for which error the judg- "ments of both of said courts are reversed and this "cause is dismissed."

We think that an examination of the Mexican statutes as set out in the record will convince the court that the laws of Mexico here relied on are so fundamentally different from our laws, and so radically opposed to our system of jurisprudence, that the *lex fori* cannot be harmonized with the *lex loci*, and hence substantial justice cannot be done to the parties litigant.

Mexican National Railway Co. v. Slater, 115 Fed. Rep., 593, was an action brought for the recovery of damages for death resulting from wrongful negligence. The court of appeals for the fifth circuit held that the laws of Mexico upon which plaintiffs based their right of action were so dissimilar to the laws of Texas that they could not, consistently with substantial justice to the parties, be enforced in the Federal court. In the course of the opinion McCormick, J., speaking for the court, says (p. 603):

> "On the subject of jurisdiction, therefore, it re- "mains to inquire only whether, consistently with "our forms of procedure and law of trials, we can do "substantial justice between the parties. From the "nature of our system of national judicature, and "from the nature of the case, there is no general law "or statute of the United States prescribing the forms

"of procedure and the law of the trial in such cases "in the circuit court other than the statute which re- "quires that the forms and modes of procedure in "civil causes in the circuit court shall conform as "nearly as may be to the forms and modes of pro- "cedure existing at the time in like cases in the "courts of record of the State within which the cir- "cuit court is held (Rev. St., § 914). As we have "seen, 'in cases of other than penal actions, the for- "'eign law, if not contrary to our public policy, or "'to abstract justice, or pure morals, or calculated "'to injure the State or its citizens, shall be recognized "'and enforced here, if we have jurisdiction of all "'necessary parties, and if we can see that, consist- "'ently with our own forms of procedure and law of "'trials, we can do substantial justice between the "'parties. If the foreign law is a penal statute, or if "'it offends our own policy, or is repugnant to justice "'or to good morals, or is calculated to injure the "'State or its citizens, or if we have not jurisdiction "'of the parties who must be brought in to enable us "'to give a statutory remedy, or if, under our forms "'of procedure, an action here cannot give a substan- "'tial remedy, we are at liberty to decline jurisdic- "'tion' (*Higgins v. Railroad Co.*, 155 Mass., 176, 180; "29 N. E., 534, 535; 31 Am. St. Rep., 544; quoted "with approval in *Huntington v. Attrill*, 146 U. S., "657; 13 Sup. Ct., 224; 36 L. Ed., 1123). We must, "therefore, look somewhat closely to the Texas law "and practice thereunder preparatory to a comparison "of that law with the laws of Mexico, to determine "whether the circuit court, in an action at law, can "give a substantial remedy and do substantial justice "between the parties in this cause."

While the whole tenor and spirit of the Mexican law upon the subject of torts is variant from that of our own laws and procedure, there are certain specific fundamental differences which, we contend, are so in conflict with the procedure in our courts that to attempt to give them effect would result in grave injustice.

Article 313 of the Federal Penal Code of Mexico, Book Second (Rec., 5), provides that—

> "The judges who take cognizance of suits based "upon civil responsibility shall endeavor that the "amount and terms of payment be fixed by agree-"ment of the parties."

There is no method under our practice by which the differences of parties litigant can be reconciled, save upon the initiative of the parties themselves.

As said by the court in *Railway Company v. Jackson, supra*, in commenting upon this article:

> "This our courts cannot do. *If this be regarded as "matter of procedure, it is of a character which may "involve a substantial benefit to the parties, of which the "defendant would be deprived by permitting the action "to be prosecuted in the courts of this State.*"

By article 323 of the Federal Penal Code of Mexico (Rec., 6) it is provided that the judge, in determining the extraordinary indemnity to be awarded as defined in article 305 of the Penal Code (Rec., 5), shall take into consideration the social position of the party injured. But to state this requirement is to show its utter repugnance to our fundamental ideas of justice. Whether the party injured be rich or whether he be poor; whether he have many de-

pendent upon him or none, is not to be considered in estimating the damages to which he may be entitled (*Pennsylvania Company v. Roy*, 102 U. S., 451).

Article 306 of the Federal Penal Code (Rec., 5), under the head of "Civil liability in criminal matters," is as follows:

> "The condition required by the two preceding articles [those defining reparation and indemnification] "that the damages and injuries should be actual, "shall not prevent the *indemnization* [evidently a mis-"translation of the Spanish word *indemnizacion* mean-"ing indemnification] for subsequent damages and "injuries be exacted by a new suit, when they shall "have accrued; if they proceed directly from, and as "a necessary consequence of, the same act or omission "from which resulted the previous damages or in-"juries."

From this article it is clear that the Mexican law contemplates and provides for successive actions based upon the same tort, and contains no provision for compounding or determining full damages for a continuing injury. The rule of the common law is that a second suit cannot be brought based upon the same wrongful act. Damages resulting from the same tort must be assessed and recovered once for all. The maxim "*interest reipublicæ ut sit finis litium*" is an ancient one. In the old leading case of *Fetter v. Beale*, 1 Salk., 11; 1 Ld. Raymd., 339, the plaintiff having once recovered for assault and battery resulting in the fracture of his skull brought a second suit alleging that after he had recovered judgment in the first suit another piece of his skull came out. The court, per Holt, C. J., held that he could not recover, the judgment in the first suit being a bar to any

subsequent suit for additional injuries resulting from the same act, and the doctrine there laid down has been uniformly followed. The tort is held to be discharged by judgment. As said in *Kitchen v. Campbell*, 3 Wils., 304; W. Bl., 827, "You shall not bring the same cause of action twice to "a final determination; '*Nemo debet bis vexari pro eadem* "'*causa*'; and what is the same cause of action is where the "same evidence will support both actions."

In *Mitchell v. Darley Main Colliery Co.*, 14 Q. B., 125; 11 App. Cas., 127, the court, per Lord Bramwell, said:

> "It is the rule that where a thing directly wrong-
> "ful in itself is done to a man, and is in itself a cause
> "of action, he must, if he sues in respect of it, do so
> "once for all. So, if he is beaten or wounded, if he
> "sues he must sue for all his damages, past, present,
> "and future, certain and contingent. *He cannot main-*
> "*tain an action for a broken arm and subsequently for a*
> "*broken rib, though he did not know of it when he com-*
> "*menced his first action.*"

And the same rule is followed by the courts in this country.

In *Filer v. Railroad Co.*, 49 N. Y., 42, the court said (p. 44):

> "Successive actions cannot be brought by the
> "plaintiff for a recovery of damages, as they may
> "accrue from time to time, resulting from the injury
> "complained of, as would be the case for a continuous
> "wrong or a continued trespass. The action is for a
> "single wrong, the injury resulting from a single act,
> "and the plaintiff was entitled to recover not only
> "the damages which had been actually sustained up
> "to the time of the trial, but also compensation for

"future damages; that is, compensation for all the "damages resulting from the injury, whether present "or prospective."

In *Railway Company v. Mohlman*, 17 Kan., 224, Mr. Justice Brewer, then upon the bench of the supreme court of Kansas, said (p. 228):

"True, the trespass has now resulted in greater "loss than was then foreseen or estimated in assess- "ment of damages; but an increase in the damages "resulting adds no new cause of action. A commits "an assault on B. Action is brought, and damages "recovered. That ends the matter; and though B's "sufferings are prolonged, and his injuries prove to "be permanent, and of a far more serious character "than was thought at the time of the recovery of "damages, there can be no new action and no further "recovery (*Fetter v. Beale*, 1 Salk., 11)."

And this is the rule in Texas. In *Street Railway Co. v. Muth*, 7 Tex. Civ. App., 443, the court said (p. 451):

"A personal injury from a single wrongful act of "negligence is an entirety, and in an action on it re- "covery may be had for all damages suffered up to "the time of the trial, and for all which are shown to "be reasonably certain or probable to be suffered in "the future."

The Mexican law, unlike that of this country, does not provide for the recovery of contingent damages. From an examination of the different articles of the Penal Code it is evident that the party injured can only recover for the direct and immediate damages which he has suffered, not

for those which are mediate or consequential to the injury. Articles 304 and 305 (Rec., 5) read:

> "Art. 304. Reparation comprehends: The payment "of all the damages caused to the injured party, to his "family, or to a third person, for the violation of a "right which is formal, existing, and not simply pos- "sible, if such damages are actual, and arise directly "and immediately from the act or omission com- "plained of, or there be a certainty that such act or "omission must necessarily cause, as a proximate and "inevitable consequence."

> "Art. 305. Indemnization [indemnification] im- "ports: The payment of damages, that is, of that "which the injured party fails to enjoy as a direct "and immediate consequence of an act or omission "by which a formal, existing and not merely possible "right is attacked, and of the value of the fruits of "the thing usurped and already consumed, in the "cases in which the same should be done conformably "with civil right."

The measure of damages, where the party is not permanently injured, is the actual loss sustained by him at the time of bringing suit. Article 321 (Rec., 6) provides:

> "In case of blows or wounds from which the in- "jured party does not remain crippled, lamed or de- "formed, he shall have the right that the responsible "party pay him all expenses of cure, the damages he "may have suffered, and that which he may fail to "gain during the time which in the opinion of com- "petent persons he may not be able to do the work by "which he subsisted. But it is essential that the in- "ability to do the work should be the direct result of "the wounds or blows, or be a cause which is the im- "mediate effect of such blows or wounds."

In the event that the injury sustained be permanent, it is provided by article 322 (Rec., 6):

> "If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation."

The method by which that liability shall be determined is prescribed in article 324 of the Penal Code (Rec., 6):

> "The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability."

It will be seen from these provisions of the Mexican Code that the relief to which one who sustains permanent injuries is entitled is in the nature of a pension, the amount of which is determined by the difference between the earnings of the injured party before and after the injury, for the recovery of which he may bring suit from time to time. This is analogous to the remedy given by the Mexican Penal Code in cases of death through wrongful negligence, as to which the court says in *Railway Company v. Slater*, 115 Fed. Rep., 593, 608:

> "Without requoting here or attempting further to analyze the provisions of the statute law of Mexico set out in the statement of the case and to some

"extent considered in the foregoing part of this "opinion, it appears clear to us from a careful com- "parison of the different sections of the statute and "a careful consideration of the deposition of the "Mexican lawyer that the right created by the Mex- "ican laws is the right to a continuing support during "the periods of time that support would have been due "from the deceased, and in the amount that it would "have been due, proportioned to his ability to give it "and the necessities of those who had the right to re- "ceive it. Any judgment that may be rendered against "the defendant must as studiously respect and enforce "its right as it does the rights of the plaintiffs. Lim- "itations placed on the right of the plaintiff are for "the protection and just treatment of the party bound. "The provisions of the Mexican law which we are "considering seem to regard and relate to not only "the paramount interest of the individual parties to "the transactions, liabilities, and reparations, but also "to the interest of the public in having the support "due to the beneficiaries so extended that it will con- "tinue through the period for which it is provided. "The provisions of the Mexican statute on this sub- "ject have in view the declaring and conserving the "interest of Mexican citizens; and where, as in this "particular case, the beneficiaries are citizens of the "United States, our laws, State and national, as ad- "ministered in our courts, may be deemed adequate "to authorize and secure the preservation of the "rights of the beneficiaries and the protection of the "interest of the public, and may yet be not adequate "to the due enforcement of the limitations put upon "the plaintiff's right for the just protection of the "party charged."

As to the inapplicability of the Mexican statutes here relied on, the decision of the supreme court of Texas, in *Railway Company v. Jackson, supra*, is, we contend, sound law and should be followed by the Federal courts. In *Texas & Pacific Railway Company v. Cox*, 145 U. S., 593, Mr. Chief Justice Fuller, in stating the cases in which a statutory delict is justiciable in a foreign jurisdiction, says (p. 605):

> "Notwithstanding some contrariety of decision
> "upon the point, the rule thus stated is generally recog-
> "nized and applied *where the statute of the State in which*
> "*the cause of action arose is not in substance inconsistent*
> "*with the statutes or public policy of the State in which*
> "*the right of action is sought to be enforced.*"

And in *Higgins v. Railroad Company*, 155 Mass., 176, quoted with approval in *Huntington v. Attrill*, 146 U. S., 657, 675, the court says:

> "These principles require that, in cases of other
> "than penal actions, the foreign law, if not contrary
> "to our public policy, or to abstract justice or pure
> "morals, or calculated to injure the State or its citi-
> "zens, shall be recognized and enforced here, if we
> "have jurisdiction of all necessary parties, *and if*
> "*we can see that, consistently with our own forms of pro-*
> "*cedure and law of trials, we can do substantial justice*
> "*between the parties.* If the foreign law is a penal
> "statute, or if it offend our own policy, or is repug-
> "nant to justice or to good morals, or is calculated to
> "injure this State or its citizens, or if we have not
> "jurisdiction of parties who must be brought in to
> "enable us to give a satisfactory remedy, or if under
> "our forms of procedure an action here cannot give
> "a substantial remedy, we are at liberty to decline
> "jurisdiction."

The decision of the highest court of Texas has held that the statutes of the Republic of Mexico upon which the plaintiff bases his action are inconsistent with the law, statutory and common, of Texas. In so far as it is a decision by the highest court of a State upon the laws thereof, this decision should be accepted and followed by the Federal courts. As said by the court in *Leffingwell v. Warren*, 2 Bl., 599, 603:

> "The construction given to a statute of a State by "the highest judicial tribunal of such State, is re- "garded as a part of the statute, and is as binding "upon the courts of the United States as the text."

And as said by Mr. Justice Field, speaking for the court, in the case of *Louisiana v. Pillsbury*, 105 U. S., 278, 294:

> "So far does this doctrine extend, that when a stat- "ute of two States, expressed in the same terms, is "construed differently by the highest courts, they are "treated by us as different laws, each embodying the "particular construction of its own State, and en- "forced in accordance with it in all cases arising "under it."
>
> *Burgess v. Seligman*, 107 U. S., 20.
> *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555, 583.
> *Stutsman County v. Wallace*, 142 U. S., 293, 306.
> *Schurtz v. Cook*, 148 U. S., 397, 411.

On the other hand, in so far as the decision of the State court is upon questions of general law involving the interpretation of foreign statutes, it is not, of course, binding upon the Federal courts, and this court must exercise its judgment independently of the State courts. Yet, as said by this court in *Railroad Company v. Baugh*, 149 U. S., 368, 370,

this court will lean toward an agreement with the State courts. The decisions of the supreme court of Texas and of the court of appeals for the fifth circuit upon the questions here involved are diametrically opposed, and a plain and palpable conflict of decisions, with its resulting confusion, thus arises. The Federal courts entertain jurisdiction of this case *solely* because of the alleged diversity of citizenship of the parties litigant. The courts of the United States sitting in Texas, by entertaining jurisdiction of this and similar cases, invite into their tribunals a numerous class of cases, cognizable *solely* upon the ground of diversity of citizenship, of which the courts of Texas decline to entertain jurisdiction, and by so doing the Federal courts are, we contend, opening their doors to abuse and injustice, rather than lending their aid to promote justice, which should be the sole reason that they should entertain jurisdiction of causes of action founded upon statutes of a foreign country. In the case at bar a citizen of Illinois has a guardian appointed in Texas, presumably for the sole purpose of bringing this action, when he could with equal ease cross the Rio Grande river and file suit in the Mexican courts, in which courts only can the plaintiff have the relief contemplated and authorized by the statutes giving the right of action. It is to avoid this conflict of State and Federal decision, with all its disastrous results, that the supervisory power of this court has been invoked. The true solution of the conflict is, we submit, to hold that, in cases like the one at bar, the courts of the United States should refuse, as do the courts of Texas, to entertain the action.

Tested by the fundamental law, it is submitted the case at bar is not one wherein the Federal courts should prop-

erly declare or enforce a rule of adjudication admittedly contrary to that declared by the highest court of the State wherein the Federal court is exercising jurisdiction. Admittedly, this case presents no *Federal* question. If the action had been presented in the State courts, and the rule as declared in the *Jackson* case were reaffirmed here by the highest court of Texas, review of that judgment in this court could not be had; for the questions thus decided would not involve a right set up and denied under the Constitution, treaties, or laws of the United States or the claimed repugnancy of a statute of the State to the Federal Constitution. This being clearly true, ought the court to declare in a case wherein jurisdiction arises solely through diverse citizenship that the law of Mexico, whereunder recovery is sought, is *not* incompatible with the law of Texas as enforced and expounded by its highest court? It cannot be denied that the latter court *has* declared that the law of tort, as interpreted and applied in Texas and under Texas law and procedure, *is*, in respect of such a case as this, so dissimilar from the Mexican law as to prevent recovery thereunder in the State courts of Texas. In declaring a contrary rule the Federal court is not interpreting or applying Federal law or statute. It is sitting in the jurisdiction of a *State* whose highest court has declared that the law *in and of* that State will not permit such recovery because the foreign law on which the claim is founded cannot be enforced in that State in consonance with its laws. Should, then, the Federal court ignore this declaration of the scope and meaning of the Texas law and within the same jurisdiction declare and enforce a wholly different rule?

The recognition and enforcement of the laws of one State

by another depends solely upon the principle of comity. The obligatory force of such laws cannot extend beyond the jurisdiction of the State enacting them, and whatever force and obligation they may have in another country depends solely upon the polity and jurisprudence, and the tacit or express consent of that other country. As said by Mr. Justice Story in his work on the Conflict of Laws (8th ed. Bigelow, p. 25, sec. 23):

> "A State may prohibit the operation of all foreign "laws, and the rights growing out of them within its "own territories. It may prohibit some foreign "laws, and it may admit the operation of others. It "may recognize and qualify some foreign law; it may "enlarge or give universal effect to others."

And again (p. 33, sec. 34), he says:

> "In a vast variety of cases which may be put, the "rejection of the laws of a foreign nation may work "less injustice than the enforcement of them will "remedy. And here again every nation must judge "for itself what is its true duty in the administration "of justice in its domestic tribunals. It is not to be "taken for granted that the rule of a foreign nation "which complains of a grievance is right, and that "its own rule is wrong."

The principle of comity, although one of international law, is in its application essentially a matter of municipal and local law, and as such is in the United States, in the absence of treaty stipulations, peculiarly a matter for the determination of the State courts. It is obvious that the State court is the appropriate tribunal to pass upon the question of whether a foreign statute is or is not in conflict

with the laws and public policy of the State, and having passed upon that question its decision thereon should be followed by the Federal courts in the State, whose duty it is to apply the laws of the State, as well as of the United States, to the controversies before them.

The court, in *Evey v. Railway Co., supra*, commenting upon the case of *Railway Company v. Jackson*, says (p. 307):

> "It is to be noticed that the action was one in a "court of the State of Texas brought by a citizen of "that State against a foreign corporation, and that "the suit before us is one brought in a court of the "United States by a citizen of the United States "against another citizen of the United States. In "the Texas case the right to sue may be affected by "comity. In our case the right to sue is specifically "granted by the statute and appears to be absolute."

We submit that the court is here in error. The question before it for determination was not whether the plaintiff, having an undoubted remedy, could enforce it in the Federal court, but whether upon his case there was any remedy to which he was entitled.

Whilst the right of a citizen of one State to sue a citizen of another State in the courts of the United States, where he has a right of action and where the amount in controversy is within the jurisdictional limit, is by statute specifically granted, and hence a fixed and absolute right in the suitor to which the Federal courts must give effect, the question of whether he has a right of action, whether there is a remedy for his case, is necessarily one to be resolved by the court, and the solution of this question in the *Evey* case, as in the *Jackson* case, involved the application of the principle of

comity, the only difference in the two cases being that in the *Evey* case the court had before it the authority and precedent of the decision of the State court in the *Jackson* case.

Viewed in its international aspect, as between the United States and the Republic of Mexico, it is submitted that the principle of international comity gives no justification for the recognition and enforcement of Mexican laws in cases such as this. The defendant company, though a citizen of the United States, owns and operates a line of railway situated almost entirely within territory belonging to the Republic of Mexico; almost all the property of the company is in Mexico; the company's contracts of service with its employés are there made and for services to be performed in Mexico, as is the certified fact in this case. The company's business is one of the highest public utility to the Republic of Mexico. Its line of road is one of the great public trade highways of that country, serving to connect the commerce of Mexico with that of the United States. It is specially recognized by the laws of that country and has a special concession from the Mexican government. It is but just and proper that the country in which the company operates; where it performs a great and necessary public service, and to whom its line is one of the vital arteries of commerce, should, in the absence of some far more cogent reason than any in this case alleged, adjudicate its controversies there arising. The Mexican courts are open to all for the redress of any grievances sustained from the company, whether by its own citizens or by citizens of the United States or of other countries, and there is no just reason why parties aggrieved should not prosecute their

claims against the company in the courts of Mexico, rather than resort to the courts of the United States across the line of the international boundary. Their rights can be as well, if not better, adjudged there than here. For the courts of the United States to undertake the adjudication of those controversies is not comity—it is discourtesy. It is to cast a slur upon the Mexican courts, and in effect to say that they are either unwilling or unable to render substantial justice. This aspect of the matter is aptly and clearly presented by the supreme court of Texas in the concluding paragraph of its opinion in *Railway Company v. Jackson*, *supra*.

III.

The laws of Mexico as pleaded and proved and which are relied on to support this case are penal in their character and such as should be given no extra-territorial effect.

The fifth question certified, *supra*, is thus stated (Rec., 79):

> "Where, according to the laws of the Republic of "Mexico, no civil liability exists unless the acts that "give rise to the civil liability must be found to be a "violation of the criminal laws of Mexico, is the "enforcement of such liability, penal in its nature, "and can this court determine the guilt of defendant "thereunder, and adjudicate the rights of the parties "based upon the criminal laws of said Republic."

Chief Justice Marshall tersely stated the rule as an established maxim "The courts of no country execute the penal laws of another" (*The Antelope*, 10 Wheat., 66, 123).

And such is the rule as between the States.

Wisconsin v. Pelican Ins. Co., 146 U. S., 265, 291.

The provisions of the law of Mexico applicable to this inquiry are article 11 of the Federal Penal Code of Mexico (Rec., 4); articles 326 and 327 of the same code, Book Second, civil liability in criminal matters (Rec., 6); article 26 of the Penal Code (Rec., 7), and the act of the Mexican Congress, December 16, 1881, articles 184 and 298 (Rec., 8). They are fully considered by the highest court of Texas in the Jackson case, *supra*, and that court concludes its consideration thereof thus:

> "While it is true that this is not a prosecution for "the crime as such, nor a suit for a penalty, it is so "closely related to that class of proceedings, that the "courts of this State should not aid in the enforce- "ment of rights arising under these laws which prac- "tically require the defendant to be tried for a crime "in the civil action."

It is of course settled by authority, whereof *Huntington v. Attrill*, 146 U. S., 657, is the leading case, that foreign penal laws which will not be enforced are those which involve a wrong to the public (p. 668) and not those which involve a wrong to the individual, and for which remedy in damages by civil action is given. But the case at bar in this aspect is clearly distinguishable from this line of authorities on two grounds:

First. That the penal provisions of this Mexican law involve fines for the benefit of the public treasury and are hence treated as public wrongs; and

Second. The public penal provisions and the civil remedy provided are so closely related as not to be enforceable under

our system as ruled in the Jackson case, *supra*, for, *inter alia*, the law of Mexico provides, article 26, Penal Code (Rec., 5):

> "Actions to enforce the civil liability may be "brought before a court of civil jurisdiction whether "or not the criminal proceeding has been commenced; "but while the latter is pending the proceedings in "the former shall be stayed."

Manifestly, proceedings in a civil action in the courts of the United States for an injury sued on under this Mexican law would not be so stayed, and yet the public interest in requiring such suspension is manifest and controlling, as well reasoned in the Jackson case, *supra*.

It is respectfully submitted that each of the questions propounded by the court below should be answered by this court in the negative, as to the jurisdiction of the circuit court to entertain this cause, and that the judgment of that court herein rendered should be reversed.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

FILE COPY.

FILED
DEC 17 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 124.

THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. W. ECKMAN, GUARDIAN OF ALFONSO HUESSELMANN, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

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Supreme Court of the United States.

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THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. W. ECKMAN, GUARDIAN OF ALFONSO HUESSELMANN, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The questions certified involve the jurisdiction of the circuit court (1) as to parties, and (2) subject-matter. This cannot be objectionable. Section 5 of the judiciary act of March 3, 1891 (25 Statutes, 826), allows such appeal or writ of error "direct" to this court, *inter alia*, "In "any case in which the jurisdiction of the court is in issue; "in such cases the question of jurisdiction alone shall be "certified to the Supreme Court from the court below for "decision."

The jurisdiction may be in issue, as here, on two grounds. It is none the less "the question of jurisdiction," though presented on several distinct grounds. It may be thereon de-

termined to exist because of diverse citizenship and not because of subject-matter, or *vice versa*.

The circuit court assumed jurisdiction and rendered final judgment. This was essential. Without such judgment the writ of error would not lie.

McLish v. Roff, 141 U. S., 661.

II.

The facts whereon the question as to jurisdiction because of *parties* arises are clearly and concisely stated therein (Rec., p. 78), and opposing counsel does not challenge their correctness in argument.

The questions certified in respect of jurisdiction because of subject-matter are stated with equal clearness. Counsel admits recovery was sought under the laws of Mexico (within whose jurisdiction the injuries complained of occurred), and that "by the laws of Mexico * * * the "minor Huesselmann had a right of action against defendant "for his damages" (Brief, p. 3); and so the plaintiff's petition, before setting out at length the laws of Mexico, averred (Rec., p. 66):

"And he says that the following were the laws of Mexico, "and are now the laws of Mexico applicable in this case, "*out of which his said right of action accrued*, and by virtue of "which the same now exists in the said Republic of Mexico, "which said laws the said plaintiff specially pleads in this "action, and hereby makes the same a part of this petition, "viz:"

The circuit court has certified the pleadings, rulings, and exceptions in a few pages (Rec., pp. 63–80), wherefrom the conceded facts appear which underlie the question of jurisdiction as to subject-matter as certified by the court. This certified portion of the record is hence embodied in the inquiries certified on this head. Reference thereto clearly shows precisely upon *what* matters of law the circuit court

desires the instruction of this court. Had the court repeated such matter already in the record in formulating the inquiries submitted upon the question of jurisdiction arising thereunder, the result would be the same. That it did not thus needlessly encumber the record is not matter for objection nor sound criticism.

III.

Counsel err in asserting that the questions of jurisdiction as to subject-matter are "purely abstract and hypothetical" (Brief, p. 3). *Contra*, they are essentially vital and are considered at length and distinctly ruled in the decisions of the circuit court of appeals cited in counsel's brief and whereon he submits this branch of the case. Having planted the primary right of recovery on the laws of Mexico, it is manifest error to now contend that judgment was recovered under American law and wholly without regard to such foreign law.

IV.

Our original brief demonstrates, both on principle and authority, the clear distinction between suits by or against representatives of estates and by or against representatives of individuals. In the former title is vested in such representative, and his citizenship controls in determining the jurisdiction of the Federal courts. In the latter the citizenship of the principal controls. We again commend examination of the authorities cited on our main brief, including *Wilcoxen v. Chicago, B. & Q. R. Co.*, 116 Fed. Rep., 444, wherein the authorities are reviewed and the question clearly reasoned to sound conclusion.

V.

Whether the law of Mexico, whose text is fully pleaded as the ground for recovery here, *is* enforceable in the courts of this country is essentially a jurisdictional question. Such law, when proven as a *fact* and sought to be applied as basis for recovery, raises at once the inquiry whether our courts have *power* to enforce its provisions.

"Jurisdiction is the power to hear and determine the "*subject-matter* in controversy between parties to a suit; to "adjudicate or exercise any judicial power over them."

Rhode Island v. Massachusetts, 12 Pet., 657, 718.

We submit the court below has sufficiently and properly certified the essential parts of the record and the inquiries arising thereon for the determination of that question in this court.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

No. 358. 124

JAN 9 1902
JAMES H. McKENNEY,
Clerk.

Brief of Patterson for D. C.

IN THE SUPREME COURT OF THE UNITED STATES AT WASHINGTON, D. C.

Filed Jan. 9, 1902.

The Mexican Central Railway Company, Limited,
Plaintiff in Error,

VERSUS

J. W. Eckman, as Guardian for Alfonso Huesselmann,
Defendant in Error.

NO. 358.

ERROR TO THE UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF TEXAS.

Brief for Defendant in Error ~~on Motion to Advance~~.

MILLARD PATTERSON,
Attorney for the Defendant in Error,
J. W. ECKMAN, Guardian, Etc.

PATTERSON & ORR, PRINTERS.

IN THE SUPREME COURT OF THE UNITED STATES AT WASHINGTON, D. C.

The Mexican Central Railway Company, Limited,
Plaintiff in Error,

VERSUS

J. W. Eckman, as Guardian for Alfonso Huesselmann,
Defendant in Error.

NO. 358.

ERROR TO THE UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF TEXAS.

Brief for Defendant in Error on Motion to Advance

STATEMENT.

The defendant in error, J. W. Eckman, as Guardian of the person and estate of Alfonso Huesselman, alleged in his petition in this cause that he and his ward are resident citizens of El Paso County, Texas, and of the Western District of Texas, and that the Mexican Central Railway Company, Limited, is a Railway

corporation duly incorporated under the laws of and a citizen of the State of Massachusetts, doing business in El Paso County, Texas, and that it owns and operates a line of railway from the City of Mexico, in the Republic of Mexico, to and into El Paso County, Texas, and carried on the ordinary business of a railway company as a common carrier of goods and passengers for hire, and that the said J. W. Eckman was duly appointed Guardian of the person and estate of the said Alfonso Huesselman, who is a minor, by the County Court of El Paso County, Texas, at the March term, 1900, thereof, and that under said appointment he duly qualified by taking the oath and giving bond as required by law. The said J. W. Eckman then proceeded to set out at length his cause of action, and in his said petition he pleaded various sections from various codes in force in the Republic of Mexico, which said laws showed that a cause of action for the injuries complained of existed in the Republic of Mexico.

The plaintiff in error interposed two pleas to the jurisdiction of the Circuit Court in and for the Western District of Texas to hear and determine this controversy. One of said pleas is as follows: "That Alfonso Huesselman, at the time of filing this suit and now being a minor, under 21 years of age, and his father and mother both being now alive, and at the time of filing this suit, and now being residents, citizens and inhabitants of the state of Illinois, and never having been residents, citizens and inhabitants of the State of Texas, nor of the Western District of Texas, and that therefore the residence and citizenship of the minor would be that of his father and mother, and hence this court would have no jurisdiction."

The other plea was that the Mexican Central Railway Company, Limited, being incorporated under the laws of the State of Massachusetts, and at the time of filing this suit, and now being a resident, inhabitant and citizen of said State of Massachusetts, and never having been incorporated under the laws of the State of Texas, and was not at the time of filing this suit a resident, inhabitant or citizen of the State of Texas, or of the Western District of Texas, and therefore the Circuit Court had no jurisdiction.

To these pleas the defendant in error interposed a demurrer, which was sustained by the trial court, and the points certified to this court are as follows:

"That the said J. W. Eckman being Guardian of the person and estate of the said Alfonso Huesselmann at the time of the filing of this suit, and being now such, and being a resident, inhabitant and citizen of the State of Texas, and of the Western District of Texas, now and at the time of the filing of this suit, has this court the jurisdiction to try said cause, and does the citizenship of said Guardian, J. W. Eckman, confer jurisditcion on this court, or does the citizenship of the minor and his parents control so as to defeat the jurisdiction of this court.

Whether or not this court has jurisdiction to try and determine this suit under the laws of Mexico as pleaded and proven in this case, in so far as such laws give rights to be determined by successive suits, give the right to extraordinary indemnity, the social position of the injured party, and in so far as the same are vague, indefinite and dissimilar to the laws of our country and controlled by our policy.

Where plaintiff's cause of action arose in the Republic of

Mexico, and the rights are to be determined by said Republic, and where defendant has continuously kept its property and operated its road in said Republic, has this court jurisdiction to hear and determine this cause in the absence of reasons shown in the pleading or proof why plaintiff did not bring his suit in the Republic of Mexico.

Upon the proposition that the citizenship of the Guardian and not that of his Ward controls the question of jurisdiction, we cite the following authorities:

In the case of Coal Co. v. Blatchford, 11 Wallace, 172, being a suit by trustees, Mr. Justice Field, in delivering the opinion, says: "Executors and trustees suing for others benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the Federal Courts, the jurisdiction is not defeated by the fact that the parties whom they may represent may be disqualified. This has been repeatedly adjudged." Further on in the opinion Mr. Justice Field cites the case of Osburn v. The Bank of the United States, 9 Wheat. 738, and says: "The Chief Justice laid it down in that case as a universal rule, that in controversies between citizens of different states, the jurisdiction of the Federal Courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record."

In the case of Insurance Co. v. Rhoads, 119 U. S. 237, Mr. Chief Justice Waite, delivering the opinion of the court, says: "That the jurisdiction depends upon the citizenship of the administrator and not on that of the intestate."

In the case of Pennington v. Smith, 78 Fed. Rep. 399, the court holds that "a testamentary trustee, or a special Guardian

appointed under a State statute for the sale of infants' land, suing in either capacity, is not a mere Guardian ad litem or next friend, and the Federal courts have jurisdiction of a suit brought by him against a citizen of a state other than his own." And the court says further: "Whether complainant be regarded as a testamentary trustee under the will, or a special Guardian under the will, or as a special Guardian under the New Jersey statute for the sale of infants' real estate, he is certainly not a mere Guardian ad litem, or next friend, as in the cases cited by the appellee, and it is on his citizenship, not on that of those whom he represent, that the jurisdiction of the Federal courts must depend;" citing Coal Co., v. Blatchford, 11 Wallace, 172.

In the case of Harper v. Norfolk & M. R. Co., 36 Fed. Rep. 102, the court says: "But apart from the legal right conferred by statute on the administrator to bring this suit, is he in anywise a party in interest? Is he not liable as administrator for the costs of this action in the event of his failure to recover, and for attorney's fees to those he has employed to bring this suit? In the event of the death of the widow and children the amount recovered would be assets in the hands as administrator for disposal according to law. If he succeeds in this action and collects the money of the defendant and fails to pay the same to the parties entitled thereto, clearly he will be liable on his official bond therefor. This distinction of the class of cases relied on by the defendant, and the case at bar, is very clearly drawn in Coal Co. v. Blatchford, 11 Wallace 172. It is scarcely necessary for the court to refer to the cases of Chappedelaine v. Dechenaux, 4 Cranch. 306; Childress v. Emory & McCleug. Wheat. 642; Osburn v. Bank, 9 Wheat. 738; Rice v. Houston, 13 Wallace 66.

In all of these cases it is clearly decided that the jurisdiction depends not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record," citing Coal Co. v. Blatchford, 11 Wallace 172.

The court is of the opinion that the plaintiff, by virtue of his citizenship, has a right to resort to the jurisdiction of this court. This right is conferred by the constitution and the laws of the United States. That he is not deprived of it by the Virginia Statute, vesting in him, and in him alone the legal right to bring this action, the demurrer to the plea must be sustained."

In the case of Popp v. C. H. & D. Ry. Co., 96 Fed. Rep. 465, the court holds that the citizenship of the administrator controls the question of jurisdiction, and not that of the parties for whom he was administrator. The court says: "The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real party so far as the prosecution of the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, or the party actively conducting the litigation is doing so in the name of the estate, in the interest of a next friend, or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who instituted it, carries it on, and with the sanction of the court may compromise or dismiss it. She has absolute control of, and is responsible for the conduct of the case," citing many authorities.

In the case of Secomb v. Wurster, 83 Fed. Rep. 860, the courts says: "In controversies between citizens of different states the jurisdiction of the Federal Courts depends not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record. If the

parties plaintiff are personally qualified by their citizenship to bring suit in the Federal Courts, the jurisdictson is not defeated by the fact that the parties whom they represent may be disqualified," citing Coal Co. v. Blatchford, 11 Wallace 172.

Article 2623 of the Revised Statutes of Texas provides as follows: "The Guardian of the estate is entitled to the possession and management of all property belonging to the ward, to enforce all obligations in his favor, to bring or defend suits by or against him."

Article 2627 of the Revised Statutes of the State of Texas provides: "The guardian of the estate shall use due diligence to collect all claims or debts owing to the ward, and to recover possession of all property to which the ward has a title or claim, provided there is a reasonable prospect of collecting such claims or debts, or of recovering such property, and if he neglects to use such diligence, he and his sureties shall be liable for all damages occassioned by such neglect."

The foregoing authorities, we believe, establish beyond controversy that the citizenship of the guardian controls the question of jurisdiction, and not the citizenship of the ward.

As to the other question, that is, the jurisdiction of the court of an action against the Mexican Central Railway Campany, for an injury occurring in the Republic of Mexico, we cite the court to the case of Evey v. Mexican Central Railway Co., 81 Fed. Rep. 294, where the question is thoroughly discussed by the Circuit Court of appeals sitting at New Orleans, and in which case the same laws that appear in the record in this case are discussed and construed, and the court in that case holds that the Circuit Court for the Western District

of Texas has jurisdiction of a case exactly like the case at bar, and in the Evey case the court cites several case from our Supreme Court. And the Circuit Court of Appeals at New Orleans expressly repudiates the doctrine announced by the Supreme Court of Texas in the case of Railway Co. v Jackson, 33 S. W. Rep. 857. The same question of jurisdiction came up before the Circuit Court of Appeals for the Fifth Circuit at New Orleans in the case of Mexican Central Railway Co. v. Marshall, 91 Fed. Rep. 833, in which the court again reviews the Mexican laws, and holds that the circuit Court in and for the Western District of Texas, had jurisdiction. In the Marshall case last above cited, the Mexican Central Railway Co presented its petition for a writ of error to the United States Supreme Court, which was denied April 11th, 1899.

And the same is again held in the case of Ry. Co. v. Glover 107 Fed. Rep 356, where the same Mexican laws are discussed, and the court holds that the Circuit Court in and for the Western District of Texas had jurisdiction of a cause of action against the Mexican Central Railway Company, Limited, arising in the Republic of Mexico.

We respectfully submit to the court that the judgement of the lower court should be affirmed.

Millard Patterson
Attorney for Defendant in Error
J. W. Eckman, Guardian etc.

No. 124.

Office Supreme Court U. S.
FILED
DEC 6 1902
JAMES H. MCKENNEY
Clerk.

Brf. of Patterson for D.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Dec. 6, 1902.

The Mexican Central Railway Company, Limited,
Plaintiff in Error,

VERSUS

J.W. Eckman, as Guardian for Alfonso Huesselmann,
Defendant In Error.

NO. 124

CERTIFIED CASE.

ERROR TO THE UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

MILLARD PATTERSON,
Attorney for the Defendant in Error,
J. W. ECKMAN, Guardian, Etc.

ELLIS BROS. PRINTERS EL PASO

INTRODUCTION.

This was an action brought in the United States Circuit Court, W. D. T., at El Paso, Texas, by J. W. Eckman, a citizen of Texas, against the Mexican Central Railway Company, Limited, (a corporation;) a citizen of Massachusetts, for damages for injuries occurring in the Republic of Mexico through the negligence of said company to Alfonso Huesselmann, a minor, said Eckman suing as Guardian of said minor. The suit resulted in a verdict and judgment in favor of said Guardian for $12,000.00.

The case is brought into this court as a certified case under Section 5 of the Act of March 3rd, 1891, and the questions certified are to be found on pages 78 and 79 of the printed transcript.

OBJECTIONS.

The defendant in error objects to the consideration of the questions certified for the following reasons:

(1) "At defendant's request the questions arising upon its 'plea in abatement' and 'amended plea of privilege' to be sued in the State of its residence, and 'its seven exceptions or pleas to the jurisdiction,' and 'its exception to the action of the trial court in instructing a verdict' for plaintiff," are certified. This is too general and involves a review of the whole case, and there is no statement showing in itself how any specific question arises. This court will not review the whole case upon numerous certified questions, or pass upon mere questions of fact; and, as the certificate shows that it covers matters of fact as well as of law and covers the whole case, particularly in so far as the exception to the action of

the court in instructing a verdict is concerned, it ought not to be considered.

(2) Defendant in error objects particularly to the consideration of the third question (page 79 of the printed transcript) for the reason that the same is purely abstract and hypothetical, and is not a question of jurisdiction. There is no pretence that the trial court determined this case under the laws of Mexico "in so far as such laws give rights that may be determined by successive suits, or in so far as they allow extraordinary indemnity, or in so far as they are vague, indefinite and dissimilar to the laws of our country and contrary to our policy."

(3) Defendant in error objects particularly to the consideration of the fourth question (page 79 of the printed transcript) for the reason that the same is purely abstract and hypothetical, and is not a question of jurisdiction. It is not intimated or pretended that the trial court held that the rights of plaintiff below were to be determined by the laws of Mexico. It is apparent that the laws of Mexico were pleaded simply to show that upon the cause of action set up plaintiff below had a right of action in Mexico, and the action being transitory he also had a right of action for the wrong complained of in the United States.

(4) Defendant in error objects to the consideration of the fifth question (page 79 of the printed transcript) for the reason that the same is purely abstract and hypothetical, and is not a question of jurisdiction. There is no pretence that the trial court found in this case that the acts complained of were in violation of the criminal laws of Mexico, or that defendant was guilty of a crime, or that such a finding was necessary before civil liability could be established, or that the rights of plaintiff below were adjudicated upon the criminal laws of said Republic.

STATEMENT.

The defendant in error (plaintiff below) alleged in his petition that by the laws of Mexico, which were in force at the time and place of the happening of the injuries complained of through defendant's negligence, the minor, Huesselmann, had a right of action against defendant for his damages. (Printed Trans. p. 66). Portions of the Federal Constitution of Mexico and of the Federal Penal Code, and of the Civil Code and of the Acts of Congress of Mexico were plead with the utmost fullness to show that the plaintiff had a right of action for the wrong complained of in Mexico on account of the civil liability of the defendant. (Printed Trans. pp. 66 to 71 inclusive.) The defendant below, after its plea in abatement was held insufficient, and after its plea of privilege was overruled, filed what it terms "seven pleas or exceptions to the jurisdiction". These "pleas or exceptions" are to be found on pages 75 and 77 inclusive of the printed transcript, and they amount to nothing more than mere exceptions or demurrers to the plaintiff's petition, and, as shown by the certificate of the trial judge, they were all overruled. In the certificate of the trial court the following language appears: "Defendant's seven pleas to the jurisdiction of the court were duly heard by the court, and after hearing the same, and all of them were by the court overruled, to which ruling of the court defendant then and there, in open court, and while the jury were in the box, duly excepted." (See Printed Trans. p. 117.) Neither the charge of the trial court to the jury, nor the measure of damages given by the trial court to the jury are shown in the record, or in the certificate of the trial court, and the verdict and judgment themselves show that the trial court did not dispose of the case upon any such theories or questions as are presented in the third, fourth and fifth questions certified, and found on page 79 of the printed transcript, but tried it and dis-

posed of it just as as any other action of the same nature arising any where would be tried and disposed of.

If this court should see fit to consider the questions as certified, then we respectfully submit the following:

The first question certified is this: "That Alfonso Huesselmann, at the time of the filing of this suit, and now, being a minor under 21 years of age, and his father and mother both being now alive and at the time of the filing of this suit, and now, being residents, citizens and inhabitants of the State of Illinois and never having been residents, citizens and inhabitants of the State of Texas, nor of the Western District of Texas, and the defendant, the Mexican Central Railway Company, Limited, being incorporated under and by virtue of the laws of the State of Massachusetts and at the time of the filing of this suit, and now, being a resident, inhabitant and citizen of said State of Massachusetts and never having been incorporated under the laws of the State of Texas and was not at the time of the filing of this suit a resident and inhabitant and citizen of the State of Texas; or of the Western District of Texas, that said J. W. Eckman being guardian of the person and estate of said Alfonso Huesselmann at the time of the filing of this suit and being a resident, inhabitant and citizen of the State of Texas, and of the Western District of Texas, and now, at the time of the filing of this suit, has this court jurisdiction to try said case and does the citizenship of said guardian, J. W. Eckman, confer jurisdiction on this court or does the legal citizenship of the minor and his parents control so as to defeat the jurisdiction of this court?"

Upon the proposition that the citizenship of the guardian and not that of his ward controls the question of jurisdiction, we cite the following authorities:

In the case of Coal Co. v. Blatchford, 11 Wallace; 172, being a

suit by trustees, Mr. Justice Field, in delivering the opinion says: "Executors and trustees suing for others benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in Federal Courts, the jurisdiction is not defeated by the fact that the parties whom they may represent may be disqualified. This has been repeatedly adjudged." Further on in the opinion Mr. Justice Field cites the case of Osburn v. The Bank of the United States, 9 Wheat. 738, and says: "The Chief Justice laid it down in that case as a universal rule, that in controversies between citizens of different states, the jurisdiction of the Federal Courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record."

In the case of Insurance Co. v. Rhoads, 119 U. S. 237, Mr. Chief Justice Waite, delivering the opinion of the court, says: "That the jurisdiction depends upon the citizenship of the administrator and not on that of the intestate."

In the case of Pennington v. Smith, 78 Fed. Rep. 339, the court holds that "a testamentary trustee, or a special Guardian appointed under a State statute for the sale of infant's land, suing in either capacity, is not a mere Guardian ad litem or next friend, and the Federal courts have jurisdiction of a suit brought by him against a citizen of a state other than his own." And the court says further: "Whether complainant be regarded as a testamentary trustee under the will, or a special Guardian under the will, or as a special Guardian under the New Jersey statute for the sale of infant's real estate, he is certainly not a mere Guardian ad litem, or next friend, as in the cases cited by the appellee, and it is on his citizenship, not on that of those whom he represents, that the jurisdiction of the Federal courts must depend;" citing Coal Co., v. Blatchford, 11 Wallace, 172.

In the case of Harper v. Norfolk & M. R. Co., 36 Fed. Rep. 102, the court says: "But apart from the legal right conferred by statute on the administrator to bring this suit, is he in anywise a party in interest? Is he not liable as administrator for the costs of this action in the event of his failure to recover, and for attorney's fees to those he has employed to bring this suit? In the event of the death of the widow and children the amount recovered would be assets in the hands as administrator for disposal according to law. If he succeeds in this action and collects the money of the defendant and fails to pay the same to the parties entitled thereto, clearly he will be liable on his official bond therefor. This distinction of the class of cases relied on by the defendant, and the case at bar, is very clearly drawn in Coal Co. v. Blatchford, 11 Wallace 172. It is scarcely necessary for the court to refer to the cases of Chappedelaine v. Dechenaux, 4 Cranch. 306; Childress v. Emory, 8 Wheat. 642; Osburn v. Bank, 9 Wheat. 738; Rice v. Houston, 13 Wallace 66. In all of these cases it is clearly decided that the jurisdiction depends not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record," citing Coal Co. v. Blatchford, 11 Wallace 172: "The court is of the opinion that the plaintiff, by virtue of his citizenship, has a right to resort to the jurisdiction of this court. This right is conferred by the constitution and the laws of the United States. That he is not deprived of it by the Virginia Statute, vesting in him, and in him alone the legal right to bring this action, the demurrer to the plea must be sustained."

In the case of Popp v. C. H. & D. Ry. Co., 96 Fed. Rep. 465, the court holds that the citizenship of the administrator controls the question of jurisdiction, and not that of the parties for whom he was administrator. The court says: "The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real

party so far as the prosecution of the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, or the party actively conducting the litigation is doing so in the name of the estate, in the interest of a next friend, or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who instituted it carries it on, and with the sanction of the court may compromise or dismiss it. She has absolute control of, and is responsible for the conduct of the case," citing many authorities.

In the case of Secomb v. Wurster, 83 Fed. Rep. 860, the court says: "In controversies between citizens of different states the jurisdiction of the Federal Courts depends not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record. If the parties plaintiff are personally qualified by their citizenship to bring suit in the Federal Courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified," citing Coal Co. v. Blatchford, 11 Wallace 172.

Article 2623 of the Revised Statutes of Texas provides as follows: "The Guardian of the estate is entitled to the possession and management of all property belonging to the ward, to enforce all obligations in his favor, to bring or defend suits by or against him."

Article 2627 of the Revised Statutes of the State of Texas provides: "The guardian of the estate shall use due diligence to collect all claims or debts owing to the ward, and to recover possession of all property to which the ward has a title or claim, provided there is a reasonable prospect of collecting such claims or debts, or of recovering such property, and if he neglects to use such diligence, he and his sureties shall be liable for all damages occasioned by such neglect."

The foregoing authorities, we believe, establish beyond controversy that the citizenship of the guardian controls the question of jurisdiction, and not the citizenship of the ward.

We have insisted and still insist that all of the other questions which are certified by the trial court are not really questions of jurisdiction at all, but present for consideration nothing but mere matters of so-called policy.

The second question submitted is substatially the same as the first but even if it differs from the first at all it presents no question of jurisdiction. And by this second question, and the third, fourth and fifth, this court is called upon to pass upon, not the question of the jurisdiction of the U. S Circuit Courts, but a mere question of policy; that is, whether or not said courts should recognize and try suits brought for injuries occurring in the Republic of Mexico, or whether said courts should arbitrarily close their doors against such suits. Every question of policy, and every question of any other nature that arises in the case as far as certified has been heretofore fully discussed and disposed of by the U. S. Circuit Court of Appeals at New Orleans, in the case of Evey vs. The Mexican Central Railway Company, Limited, 81 Fed. Rep. p. 294, and in this case determined by said U. S. Circuit Court of Appeals at New Orleans identically the same laws that appear in the record in this case are discussed and construed, and said court holds that the Circuit Court for the Western District of Texas should recognize a case exactly like the one at bar and should proceed and try the same.

The very same question came before the Circuit Court of Appeals for the the Fifth Circuit at New Orleans in the case of the Mexican Central Railway Company vs. Marshall, 91 Fed. Rep. p. 833, in which said court again reviewed the Mexican laws and held that the Circuit Court in and for the Western District of

Texas should recognize its jurisdiction and proceed to try the case, and in the Marshall case last above cited the Mexican Central Railway Company, Limited, presented its petition for a writ of certiorari to the United States Supreme Court, (No. 730, Mexican Central Railway Company Limited vs. A. M. Marshall,) which petition was denied in April 11th, 1899, and in said petition for certiorari said Mexican Central Railway Company, Limited, presented for consideration the very matters that are presented in this case now as certified. The same questions came up again before the U. S. Circuit Court of Appeals at New Orleans in the case of the Mexican Central Railway Company, Limited, against Glover 107 Fed. Rep. page 356, where the same Mexican laws are discussed and the same holding adhered to, and it is asserted as a proposition beyond controversy that the Circuit Court in and for the Western District of Texas has jurisdiction of such a cause of action against the Mexican Central Railway Company, Limited, arising in Republic of Mexico.

We will not weary this court with an argument about these matters, which even the Supreme Court of Texas calls matters of policy, and we deem it sufficient to refer to the opinion and conclusive argument of the U. S. Circuit Court of Appeals at New Orleans in the case of Evey vs. The Mexican Central Railway Company, Limited, cited above. This case is also reported in the 52 U. S. Appeals at page 118. From the Statement of the Evey case as made by the Circuit Court of Appeals, this court will see that the identical question (question of policy) were presented for the consideration of the court at New Orleans that are now presented for this court's consideration, and that court in disposing of the Evey case says "Our courts either have jurisdiction of the class of cases we are discussing, or they have not, and the question of whether a man has voluntarily resorted to our courts or

been forced into them, or whether commerce between Mexico and Texas will be injured or protected by compelling the payment by a corporation of damages for the wrongs it has inflicted or the condition of our dockets, can have no weight or force in determining jurisdiction. These are considerations that may possibly address themselves to the notice of Legislatures but not to the determination of courts. Courts are not at liberty to assume or decline jurisdiction upon speculative grounds or for reasons of public policy."

"We are not willing to subscribe to the doctrine that a citizen of Texas who has suffered wrongs transitory in their nature in a foreign country at the hands of one who has his legal domicile in this State, before he can obtain redress at the hands of our courts must show that he has been refused aid in the foreign courts and make it appear that he comes to the courts of this country unwillingly and as a last resort. Jurisdiction of a cause should not be made to depend upon any such circumstance."

Respectfully submitted,

Mellard Patterson

Attorney for the Defendant in Error.

Supreme Court of the United States.

No. 124.—October Term, 1902.

The Mexican Central Railway Company, Limited, Plaintiff in Error, vs. J. W. Eckman, Guardian of Alfonso Huesselmann.	In error to the Circuit Court of the United States for the Western District of Texas.

[January 5, 1903.]

This was an action brought in the Circuit Court of the United States for the Western District of Texas by J. W. Eckman, a citizen and resident of that district, as guardian of Alfonso Huesselmann, a minor, against the Mexican Central Railway Company, a corporation of Massachusetts, to recover damages for injuries sustained by him in the Republic of Mexico through the negligence of the company, in whose employment he then was. The complaint set out certain sections of the constitution, of the penal and civil codes, and acts of Congress and regulations thereunder, of Mexico, and averred that, "by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth," plaintiff had a right of action in Mexico, and that the same existed in the United States; and also that the acts of negligence complained of were wrongful and actionable in the United States and in the State of Texas, as well as in the Republic of Mexico. Defendant filed a plea in abatement to the effect that Huesselmann was not then, or at the time of the infliction of the injuries, a citizen or resident of the State of Texas, but that he and his parents were citizens and residents of the State of Illinois; and that defendant was a resident and citizen of Massachusetts, and had not waived its right to be sued there, which right it pleaded, and asked that the action be dismissed. The plea was overruled, and defendant filed an answer containing seven exceptions or pleas to the jurisdiction, an exception to the complaint for insufficiency, and a general denial. All of the pleas were overruled, and the case was tried before a jury, a verdict rendered in plaintiff's favor, and judgment entered thereon. Thereupon a writ of error was allowed from this court on a certificate that the following questions of jurisdiction arose:

"First. That Alfonso Huesselmann, at the time of the filing of this suit, and now being a minor under twenty-one years of age, and his father and mother both being now alive, and at the time of the filing of this suit and now being residents, citizens and inhabitants of the State of Illinois, and never having been residents, citizens and inhabitants of the State of Texas,

nor the Western District of Texas, and the defendant, The Mexican Central Railway Company, Limited, being incorporated under and by virtue of the laws of the State of Massachusetts, and at the time of the filing of this suit, and now, being a resident, inhabitant and citizen of said State of Massachusetts, and never having been incorporated under the laws of the State of Texas, and was not at the time of the filing of this suit a resident, inhabitant or citizen of the State of Texas or of the Western District of Texas; that said J. W. Eckman, being guardian of the person and estate of said Alfonso Huesselmann at the time of the filing of this suit, and being such now, and being a resident, inhabitant and citizen of the State of Texas and of the Western District of Texas, now, and at the time of the filing of this suit; has this court jurisdiction to try said cause, and does the citizenship of said guardian, J. W. Eckman, confer jurisdiction on this court, or does the citizenship of the minor and his parents control so as to defeat the jurisdiction of this court?

"Second. Whether or not this court has jurisdiction to try and determine said suit, where the minor, Alfonso Huesselmann, and defendant, Mexican Central Railway Company, Limited, are not citizens of this State and district, and where the cause of action arose in the Republic of Mexico, in which republic the contract of service was made and the services thereby contemplated were to be performed?

"Third. Whether or not this court has jurisdiction to try and determine this suit under the laws of Mexico as pleaded and proved in this case, in so far as such laws give rights that are to be determined by successive suits, give the right to extraordinary indemnity, considering the social position of the injured party, and in so far as the same are vague, indefinite and dissimilar to the laws of our country and contrary to our policy?

"Fourth. Where plaintiff's cause of action arose in the Republic of Mexico, and the rights are to be determined by the laws of said republic, and where defendant has continuously kept its property and operated its road in said republic, has this court jurisdiction to hear and determine this cause in the absence of any reason shown in the pleading or proof why plaintiff did not bring his suit in the Republic of Mexico?

"Fifth. Where, according to the laws of the Republic of Mexico, no civil liability exists unless the acts that give rise to the civil liability must be found to be a violation of the criminal laws of Mexico, is the enforcement of such liability penal in its nature, and can this court determine the guilt of defendant thereunder, and adjudicate the rights of the parties based upon the criminal laws of said republic?"

Mr. Chief Justice FULLER delivered the opinion of the Court:

This case is brought directly from the Circuit Court to this court under the first subdivision of the fifth section of the judiciary act of March 3, 1891, providing that that may be done: "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." It must be regarded as settled that the jurisdiction here referred to is the jurisdiction of the Circuit or District Courts of the United States as such, *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501;

that the whole case is not open to us, but only the question of jurisdiction. *Horner* v. *United States*, 143 U. S. 570, 576; *United States* v. *Jahn*, 155 U. S. 112; and that review by certificate is limited to the certificates by the Circuit or District Courts, made after final judgment, of questions made as to their own jurisdiction, and to the certificates by the Circuit Courts of Appeals of questions of law in relation to which the advice of this court is sought as therein provided. *United States* v. *Rider*, 163 U. S. 132.

Defendant's counsel condenses the propositions relied on into these: (1) That "the citizenship of the ward, the actual plaintiff, not that of the guardian, the nominal plaintiff, controls;" (2) that "the laws of Mexico as pleaded and proved and which are relied on to support this case are so vague and indefinite and so dissimilar to the laws of Texas as to be incapable of enforcement in our courts, and are inconsistent with the statutes and public policy of Texas:" and (3) that these laws "are penal in their character and such as should be given no extra-territorial effect."

But apart from the question of jurisdiction in respect of citizenship, it is apparent that the jurisdiction of the Circuit Court as a court of the United States was not put in issue, for the other contentions were matters on the merits, and this judgment to the contrary is not void but is only open to be attacked for error, while, in any aspect, the objections applied to all courts of this country and not particularly to the Federal courts.

And if the jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, the case should have been taken to the Circuit Court of Appeals for the Fifth Circuit, to which court previous similar cases have been carried, and by which the questions suggested here have been dealt with. *Evey* v. *Mexican National Railway Company*, 52 U. S. App. 118; *Mexican National Railway Company* v. *Marshall*, 34 C. C. A. 133.

These matters, however, are not properly before us in this case, and we intimate no opinion upon them.

The question for us to determine is whether the jurisdiction of the Circuit Court can be sustained through the citizenship of the guardian.

It is admitted that Eckman was duly appointed guardian of both the person and estate of Huesselmann by the proper court of Texas thereto empowered, and that he was a citizen and resident of the Western District of Texas.

Under the act of March 3, 1887, c. 373, as corrected by that of August 13, 1888, c. 866, actions may be brought in any district in which either the plaintiff or the defendant resides. We have held that a corporation incorporated in one State only cannot be compelled to answer in a Circuit Court of the United States held in another State, to a civil suit, at law or in equity, brought by a citizen of a different State. *Shaw* v. *Quincy Mining*

Company, 145 U. S. 444. But that is not this case, as here the action was brought by a citizen of Texas in the district of his residence.

The question is whether under the laws of Texas a guardian can sue in his own name to recover damages for injuries sustained by the ward, and it is unaffected by the permanent domicil of the ward. *Hoyt* v. *Sprague*, 103 U. S. 613; *New Orleans* v. *Gaines' Administrator*, 138 U. S. 595, 606; *Delaware County* v. *Diebold Safe Company*, 133 U. S. 473, 488.

It is true that where a State or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the Federal courts depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines' Administrator*, by Mr. Justice Bradley, "we have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespective of the citizenship of the persons whom they represent, such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law."

If in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond.

The Revised Statutes of Texas provide:

"ART. 2623. The guardian of the estate is entitled to the possession and management of all property belonging to the ward; to collect all debts, rents, or claims due such ward; to enforce all obligations in his favor; to bring and defend suits by or against him; but in the management of the estate the guardian shall be governed by the provisions of this title.

"ART. 2624. The guardian of both person and estate has all the rights and powers, and shall perform all the duties of the guardian of the person and of the guardian of the estate."

"ART. 2627. The guardian of the estate shall use due diligence to collect all claims or debts owing to the ward, and to recover possession of all

property to which the ward has a title or claim; provided, there is a reasonable prospect of collecting such claims or debts, or of recovering such property; and if he neglects to use such diligence he and his sureties shall be liable for all damages occasioned by such neglect."

In *Roberts* v. *Sacra, Guardian*, 38 Tex. 580, it was ruled that the guardian for minor heirs might sue in his own name on a promissory note payable to the ancestor of his wards on showing that they were the only heirs of the payee, and that there was no administration on the estate.

In *Houston & Texas Central Railway Company* v. *Bradley, Guardian*, 45 Tex. 171, 176, it was held that under a law authorizing suit for death by wrongful act, which provided that actions thereunder should be "for the sole and exclusive benefit of the surviving husband, wife, child, or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any one of them," the suit might properly be brought in his own name by the guardian of the estate of minor children of the person whose death was caused by such act, and the court said: "It is not regarded as material whether the suit is brought in the name of the guardian for his ward or in the name of the ward by his guardian. By the laws of Texas, the guardian of the person is entitled to the charge and control of the person of the ward, and the guardian of the estate is entitled to the possession and management of the property belonging to the ward, and to collect all claims and debts due him, to enforce all obligations in his favor, and to bring and defend suits by or against him."

And see *March* v. *Walker, Guardian*, 48 Tex. 372, where Walker sued as guardian of one of three children, and as next friend of the two others, and attention was called in respect of the two to the then statute, subsequently repealed, providing for the appointment of a special guardian to prosecute suits; and *Gulf &c. Railway Company* v. *Styron, Next Friend*, 66 Tex. 421, in which the action had been brought "by W. W. Styron, next friend of Millie Styron, a minor," and it was decided that it was not necessary "that the pleadings must show, in so many words, that the action is brought by the minor by next friend," although cases so ruling could be found.

We are unable to hold that the Circuit Court erred in assuming that this guardian had the legal right to bring the action in his own name, and it is on his citizenship and not on the citizenship of the ward that the jurisdiction of the Circuit Court depended.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.